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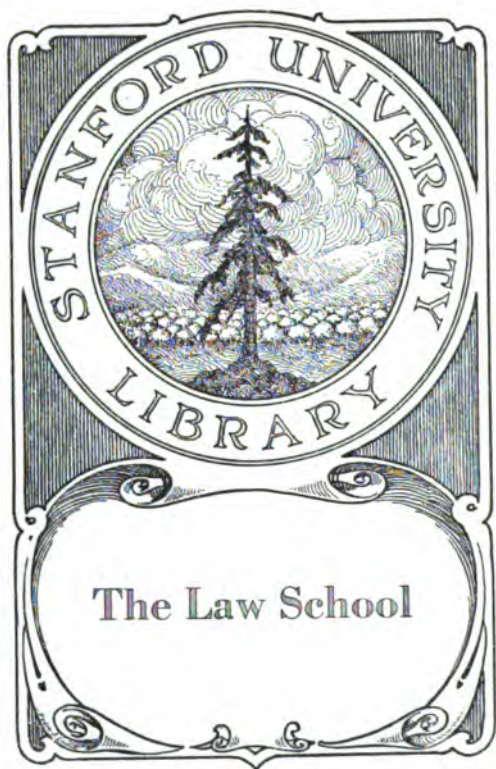
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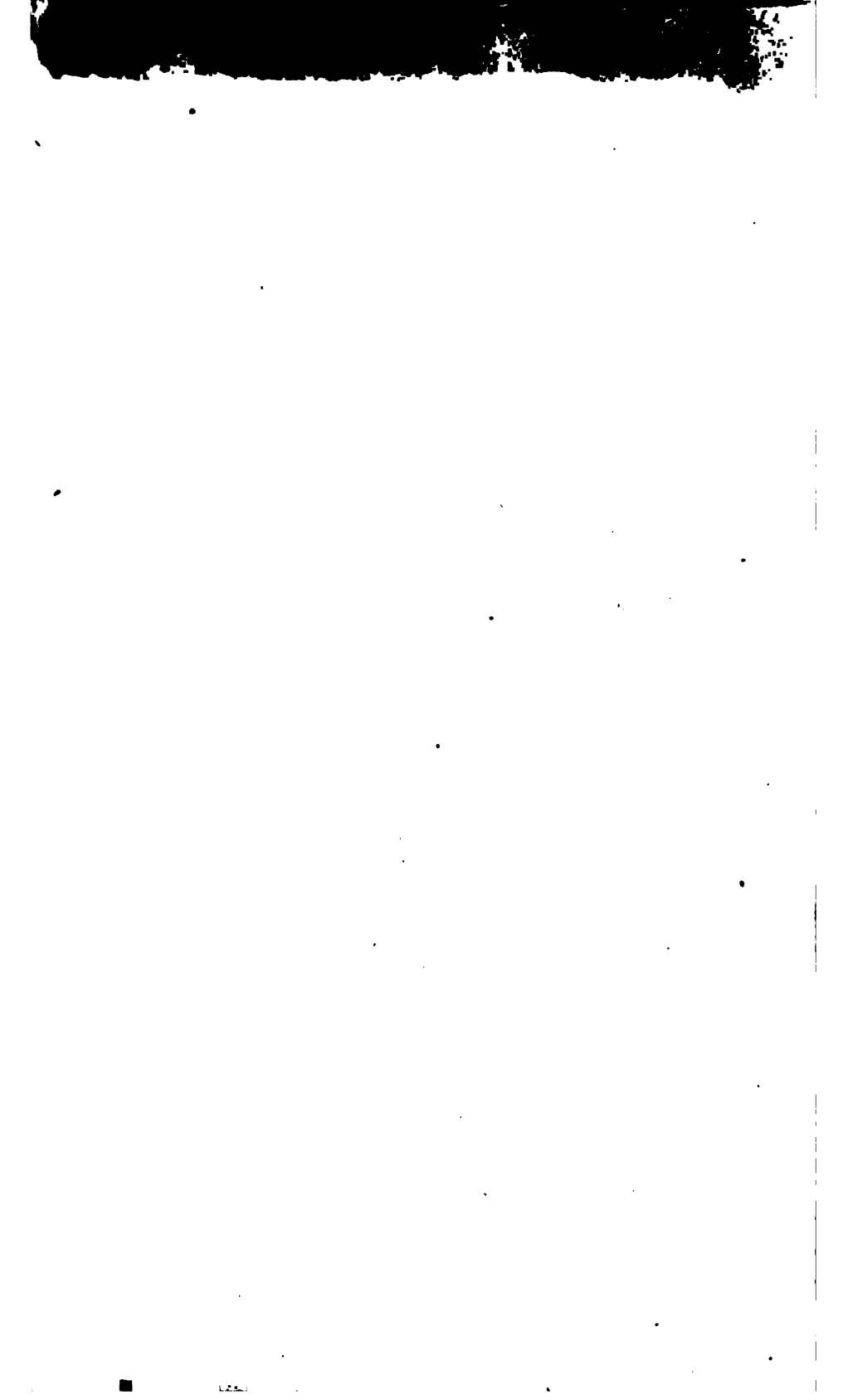
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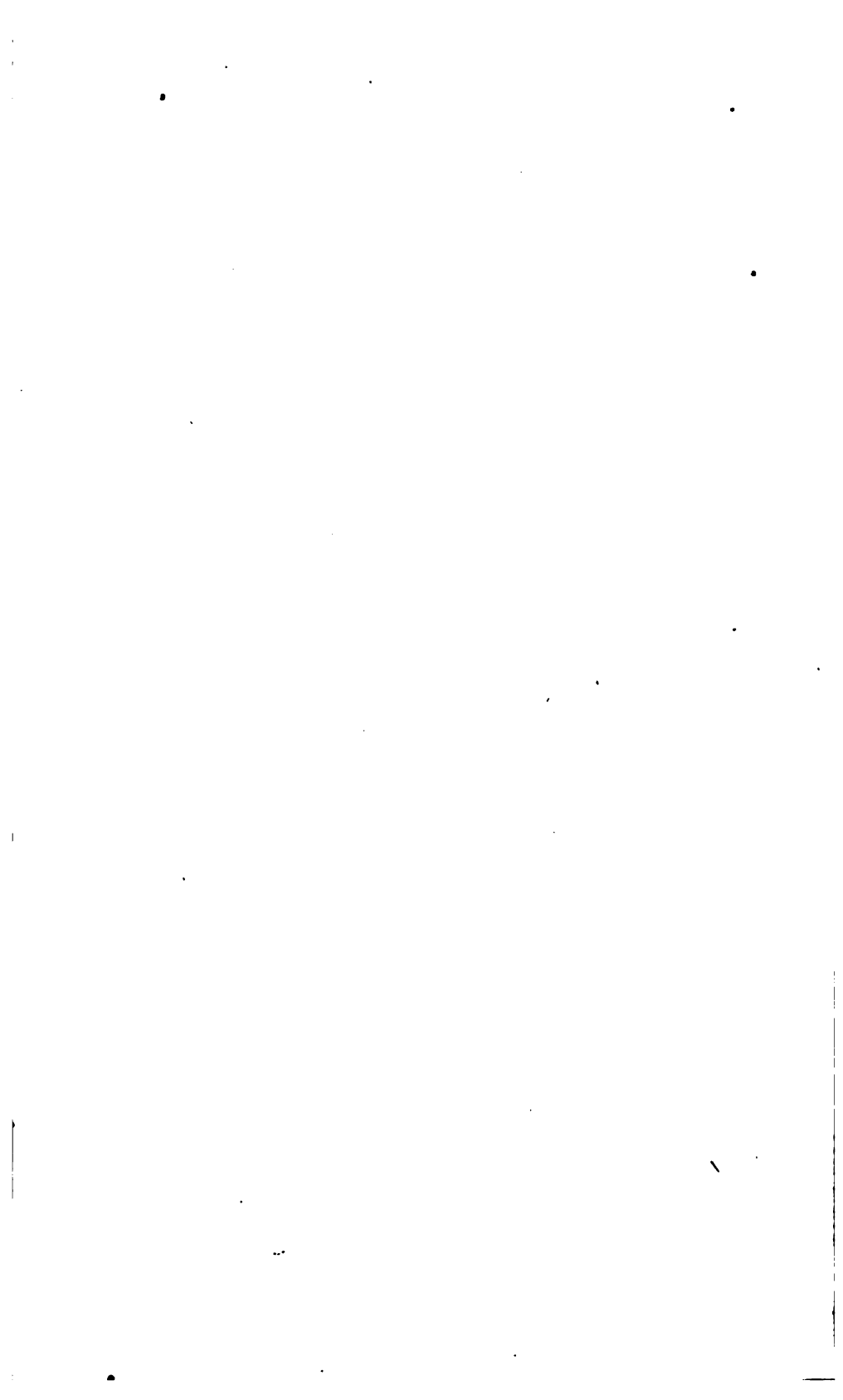
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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

WITH ADDITIONAL CASES DECIDED DURING THE SAME PERIOD, SELECTED FROM THE CONTEMPORANEOUS REPORTS AND FROM THE DECISIONS IN THE HOUSE OF LORDS, WITH REFERENCES TO DECISIONS IN THE AMERICAN COURTS.

Gillaspie

VOL. CVII.

CONTAINING

THE CASES ARGUED AND DETERMINED IN THE COURT OF QUEEN'S BENCH, AND IN THE EXCHEQUER CHAMBER, IN TRINITY TERM AND VACATION, AND MICHAELMAS TERM AND VACATION, 1860, AND HILARY TERM AND VACATION, 1861. XXIII. AND XXIV. VICTORIA.

JAMES PARSONS, Esq.,
EDITOR.

PHILADELPHIA:

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STANFORD UNIVERSITY

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ON APPEAL FROM THE COURT OF QUEEN'S BENCH.

WITH TABLES OF THE NAMES OF THE CASES REPORTED AND CITED, AND
THE PRINCIPAL MATTERS.

BY
THOMAS FLOWER ELLIS, OF THE MIDDLE TEMPLE,
AND
FRANCIS ELLIS, OF THE INNER TEMPLE,
ESQRS., BARRISTERS AT LAW.

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OF
THE COURT OF QUEEN'S BENCH,
DURING THE PERIOD OF THESE REPORTS.

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Sir WILLIAM WIGHTMAN, Knt.
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CASES.

ARGUED AND DETERMINED.

THE QUEEN'S BENCH,

Trinity Term,

XXIII VICTORIA. 1860.

Willaspi

The Judges who usually sat in Banc in this Term, were,—

COCKBURN, C. J.

CROMPTON, J.

WIGHTMAN, J.

BLACKBURN, J.

PATTEN, Appellant, v. RHYMER, Respondent. May 26.

Stat. 9 G. 4, c. 61, s. 21, imposes penalties upon an innkeeper for offences against the tenor of his license. The form of license is given in Schedule C. of the Act, and contains a proviso that the innkeeper shall "not knowingly suffer any unlawful games or any gaming whatsoever" in the licensed house and premises.

Held, that an innkeeper was liable to conviction, under sect. 21, for playing cards for money with private friends of his own in his own private room in the inn.

CASE stated by two justices of Essex, under stat. 20 & 21 Vict. c. 43.

This was an information under stat. 9 G. 4, c. 61, s. 21, against the appellant, who is an innkeeper at Great Baddow, in Essex, for knowingly suffering gaming in *his house and premises, by permitting several persons to play at cards for money; contrary to the tenor of his license. It was proved by the evidence of two police officers that, about twelve o'clock on the night of 10th January, 1860, they entered the inn kept by the appellant, at Great Baddow, as a party then in the house was in the act of breaking up and leaving; that they found cards and also money upon a table in the bar-parlour, where five persons had been assembled, and four of whom were then in the room, the appellant being one of them. The appel- [*2

lant admitted that they had all been playing cards together, for money, at a very low stake, and that the other four persons had come there by his invitation. On behalf of the appellant it was satisfactorily proved that the parties present were respectable tradesmen of the parish, moving in the same sphere of life as himself, and that they had come to his house, upon the occasion in question, as his private friends and by his special invitation; that they had all been in the habit of visiting at each other's houses for the purpose of playing a friendly game of cards, and it had arrived at the appellant's turn to invite them to his house; and that the room where they were assembled was a private room of the appellant, and there were no other persons in the house but the five persons before mentioned.

It was contended before the justices, on behalf of the appellant, that the law was never intended to deprive the innkeeper of his right to invite his private friends to his house for the purpose and under the circumstances proved.

The justices were of a contrary opinion, and held that, under the words of the statute and the tenor of his license, an innkeeper was *3] not entitled knowingly *to permit cards to be played for money in any part of his licensed house and premises; and they therefore convicted the appellant in a mitigated penalty.

The question for the opinion of the Court was, whether, under the circumstances, the determination of the justices was right.

No counsel appeared in support of the conviction.

Barrow, for the appellant.—The appellant has committed no offence against the tenor of his license. The form of the license is given in stat. 9 G. 4, c. 61, Schedule C., and contains a proviso that the person licensed shall not “knowingly suffer any unlawful games or any gaming whatsoever” in the licensed premises. The appellant has been convicted for knowingly suffering gaming in his premises. But, in the first place, all playing at cards is not gaming. Stat. 8 & 9 Vict. c. 109, s. 1, repeals so much of stat. 33 Hen. 8, c. 9, as declares any game of mere skill an unlawful game. Games at cards which require the exercise of skill, and are not mere games of chance, are, therefore, no longer unlawful: and, as the conviction does not specify the particular game which was played, the appellant is entitled to the benefit of the presumption that it was a game of skill. [CROMPTON, J.—How can any games at cards be games of mere skill? COCKBURN, C. J.—All such games are more or less games of chance, though requiring skill also. WIGHTMAN, J.—In Richardson's Dictionary “to game” is defined, “to play for money.”] Every game played for money is not unlawful. [BLACKBURN, J.—But is it not gaming?] Even assuming that it is, then, in the second place, it cannot have been in the contemplation of the Legislature to prevent an innkeeper *4] from *inviting his private friends to a game of cards with him in a private part of the house. The acts which the statute forbids him to do or allow are acts done or allowed by him as an innkeeper, not as an individual. [COCKBURN, C. J.—There is this to be said in your favour, that it does not appear that the appellant intended any colourable evasion of the statute. Still, the Legislature may have intended to prohibit all card playing on the licensed premises. WIGHTMAN, J.—The difficulty of any other construction of the

statute is that it would open a door to collusion.] The part of the premises where the appellant was entertaining his friends was his private dwelling-house, and not part of the inn.

COCKBURN, C. J.—The words of the license are large enough to embrace the circumstances of the present case, and to justify the conviction. There is certainly a great difference between what is done by the landlord of an inn as landlord, and that which he does as a private individual. The Legislature may, however, have thought it necessary to prohibit any gaming, by any person, on any part of the licensed premises. Although I am not quite satisfied that such was their intention, I think that the safer course is to hold that it was; just as they appear, by the preceding proviso in the form of license, to have prohibited drunkenness or other disorderly conduct in any part of the premises.^(a)

WIGHTMAN, J.—I am of opinion that the conviction was right. I consider that the object of the Legislature *was to impose, [*5 upon any person obtaining a license, the condition not knowingly to suffer any gaming on the licensed premises; whether the gaming be unlawful or what may be called innocent. The words “any gaming whatsoever” are wide enough to prohibit gaming of every description. Playing cards for money is gaming; granting that, under the circumstances of the present case, the gaming was innocent. Although nothing of the sort is here imputed to the appellant, it might be easy for a fraudulent person to evade the law, supposing it not to prohibit all playing at cards for money, by pretending that the gaming consisted merely of playing at a lawful game at cards with his private friends.

CROMPTON, J.—The schedule to stat. 9 G. 4, c. 61, gives the form of license; which forbids not unlawful games only, but any gaming whatsoever. It was in the first place contended for the appellant that stat. 8 & 9 Vict. c. 109, s. 1, has rendered certain games, formerly prohibited, lawful; but that enactment cannot be called in aid to interpret the word “gaming” in this beer Act. As my brother Wightman has pointed out, playing for money is gaming. The only question therefore is, whether gaming by the landlord with his private friends in his private room is within the prohibition in the license. If the prohibition does not extend to such gaming, it must follow that the prohibition against allowing drunkenness on the premises will not prevent a landlord from allowing his private friends to get drunk there. I think that gaming by the landlord’s private friends is both within the words of the Act and within the *mischief sought to [*6 be prevented; and that the justices were right in convicting, however innocent the appellant may have been of any wrong intention.

BLACKBURN, J.—I am of the same opinion. The tenor of the license is not confined to preventing persons who are the public guests of the innkeeper from gaming; but is intended to prohibit all gaming whatsoever, for fear lest unlawful gaming should be collusively carried on on any part of the licensed premises. I think therefore that the

(a) The preceding proviso is, “that” the innkeeper “do not wilfully or knowingly permit drunkenness or other disorderly conduct in his house or premises.”

justices put a proper construction on the Act, in holding that the appellants had committed an offence against the tenor of his license.
Conviction affirmed.

**HARRISON v. THE LONDON, BRIGHTON AND SOUTH
COAST RAILWAY COMPANY. May 29.**

[Reported, in the Queen's Bench and in the Exchequer Chamber on error from that Court, 2 B. & S. 122 (E. C. L. R. vol. 110).]

***7] CHILCOTE, Appellant, v. YOULDEN, Respondent.
May 26, 30.**

Stat. 15 & 16 Vict. c. 79, s. 13, empowers the valuer acting in the matter of an enclosure to apply to justices to recover possession of any encroachment or enclosure which, under stat. 8 & 9 Vict. c. 118, "shall be deemed to be parcel of the land subject to be enclosed," possession of which the actual occupier neglects or refuses to deliver up, after the determination of claims under that Act.

Held that, on the hearing of such an application by the valuer, the justices have jurisdiction to inquire into the circumstances attending the encroachment or enclosure in question: notwithstanding that the occupier has made no claim before the valuer or the Enclosure Commissioners, and has not appealed against the award of the Commissioners, which includes the land in dispute. That, therefore, the justices were right in refusing to order possession to be given to the valuer of a piece of land proved to them to have been first enclosed more than twenty years before the first meeting of the commissioners for the examination of claims; such land being, under stat. 8 & 9 Vict. c. 118, s. 52, an ancient enclosure, and that section, taken with section 50, showing that enclosures, only, of less than such twenty years' standing are, under that Act, to be deemed to be parcel of the land subject to be enclosed.

CASE stated by justices under stat. 20 & 21 Vict. c. 43.

At a Petty Sessions of the peace, held in and for the division of Paington, in the county of Devon, on 19th January, 1860, a complaint in writing was made, under the provisions of stats. 8 & 9 Vict. c. 118, and 15 & 16 Vict. c. 79, s. 13, by the appellant, the valuer appointed and acting in the matter of the enclosure of the commons and waste lands of the manor of Brixham, in the county of Devon, against the respondent, an occupier holding over and detaining a portion of land used as garden ground, and alleged to be within the limits of the said common. On the part of the appellant, evidence was given of his appointment as valuer, and that the piece of ground occupied and held over by the respondent was originally an encroachment on the said common, and included in the map of the commons annexed to the provisional order for the said enclosure, under the seal of the Enclosure Commissioners. That no claim in *respect thereof, or

***8]** in reference thereto, was made by the respondent before, or delivered to, the appellant as such valuer, or otherwise, at the several times or places by him appointed and notified for such purpose. That the valuer had duly allowed the majority of the claims that were so made by other parties, and that the land occupied by the respondent was included and allowed in such claims. And it was thereupon argued, on behalf of the said appellant, that the land, so occupied

and held over, was an encroachment which, by being included in the provisional order, must thereby be "deemed to be parcel of the land subject to be enclosed," and therefore such as he was empowered to recover under the provisions of stat. 15 & 16 Vict. c. 79, s. 13. On the part of the respondent, the above facts were not disputed; but it was proved, in addition thereto, that the said piece of ground had been enclosed for more than twenty years next preceding the day of the first meeting for the examination of claims, but that the fences thereof were during portions of such time in an imperfect condition; and that it had been so occupied by different persons not claiming directly from each other, or setting up any special title thereto. And it was thereupon urged that the said enclosure was an ancient enclosure under the provisions of stat. 8 & 9 Vict. c. 118, s. 52, and therefore such as, by sect. 86 of the last named Act, the valuer was not empowered to order to be enclosed without the consent in writing of the person interested therein, which said consent had not been given.

The justices thereupon considered that the fact so proved before them, that the enclosure was an ancient one, was a sufficient answer to the complaint, and that it was not necessary that any claim thereto should have been *set up before the valuer, but might be [*9 pleaded, notwithstanding, as a justification for so holding over: and that the respondent could not be dispossessed of the said piece of ground without his consent in writing first had and obtained. And they dismissed the said complaint.

The appellant thereupon applied to them to state a case for the opinion of this Court thereon, on the grounds following.

First: That the acts of the valuer were conclusive, and could not be questioned before the justices.

Secondly: That the said encroachment, being included in the map annexed to the provisional order for enclosure by the Commissioners, was thereby conclusively "deemed to be parcel of the land subject to be enclosed" within the meaning of stat. 15 & 16 Vict. c. 79, s. 13.

Thirdly: That, such provisional order being conclusive as to what land should be "deemed to be subject to be enclosed," it was beyond the jurisdiction of the justices to hear any evidence as to the fact of its being an ancient enclosure, or any evidence in relation to such encroachment, other than was required to prove the allegations contained in the said complaint.

Fourthly: That, as the encroachment in question was included in the map annexed to the provisional order, the respondent was bound to have delivered a claim in writing to the valuer for any "right or interest he may have had or claimed in any land proposed to be enclosed," under sect. 17 of stat. 8 & 9 Vict. c. 118, or to have appealed against the decision of the valuer (appellant), in respect of such claims as were delivered to, determined on, and allowed by, the valuer, under sect. 48 of the last named Act.

Fifthly: That, the fences of the said piece of land having been kept in an imperfect condition during the *twenty years next pre- [*10 ceding the first examination of claims, and the said piece of ground having been occupied, during such last mentioned term, by different persons, not claiming directly from each other, or setting up any special title thereto, the said piece of ground was not, therefore, an

ancient enclosure, within the meaning of sects. 52 and 86 of stat. 8 & 9 Vict. c. 118; but an "encroachment" within the meaning of sect. 50 of the said Act.

If the Court should be of opinion that the facts so proved before the justices were not sufficient to constitute a piece of ground so held over an "ancient enclosure" within the meaning of sect. 52 of stat. 8 & 9 Vict. c. 118; or if they should think that, notwithstanding its being such ancient enclosure, the respondent was nevertheless estopped, for the reasons above assigned, from pleading the same in answer to the said complaint, then judgment was to be for the appellant.

J. D. Coleridge, for the appellant.—First; the valuer's decision, while unappealed against, was conclusive, and could not be questioned before the justices, but only by appeal to the Enclosure Commissioners. Secondly; the land held over by the respondent, being included in the map annexed to the provisional order for enclosure by the Commissioners, must be conclusively "deemed to be parcel of the land subject to be enclosed" under stat. 8 & 9 Vict. c. 118, within the meaning of stat. 15 & 16 Vict. c. 79, s. 18(a). Thirdly; the justices were wrong, in any event, in holding that the facts showed that the land was an ancient enclosure within the meaning of stat. 8 & 9 Vict. c. 118, s. 52. As to the first point, stat. *8 & 9 *11] Vict. c. 118, by sects. 25–27, provides for the application, by persons proposing to enclose land subject to be enclosed, to the Enclosure Commissioners; the reference of the matters by them to an assistant Commissioner; and the subsequent embodiment by them of the conditions of the proposed enclosure in a provisional order. Sect. 33 enacts that a valuer shall be appointed; sect. 34 defines his powers and duties, and sect. 35 enables him to call in an assistant Commissioner as assessor, in matters of contested claims. [WIGHTMAN, J.—Do the claims there mentioned include a disputed question as to whether land is an ancient enclosure or not? Does not that section refer rather to claims as to land which it is admitted is subject to be enclosed?]

Karslake, contra.—The section is limited to contested claims to lands subject, under sect. 11, to be enclosed.

J. D. Coleridge.—At all events the decision of the valuer on any claim is conclusive. By sect. 39 the Commissioners, or an assistant Commissioner, are empowered, on the representation of the valuer, to set out the boundaries of parishes or manors in which any land proposed to be enclosed is situate; subject to a right of appeal to this Court, or to an inquiry before a sheriff's jury. Sect. 44 regulates the proceedings upon the appeal. By sects. 46–49, the valuer is required to hold meetings and determine claims, in the matter of an enclosure. By sect. 50 all encroachments within twenty years "shall be deemed parcel of the land subject to be enclosed, and shall be" "enclosed accordingly," "and in case any dispute or difference shall arise touching any such encroachments" "or as to the extent thereof, such *12] *dispute or difference shall be determined by the valuer." Sect. 52 provides that enclosures of twenty years' standing shall be deemed ancient enclosures; but if a valuer has decided under sect.

50, that an enclosure is not ancient, the only remedy of a party dissatisfied with his determination is by appeal against it, under sect. 55, to the Commissioners or an assistant Commissioner. The statute points out a regular course of proceeding, which, as *Kindersley, V. C.*, decided in *Turner v. Blamire*, 1 Drew. 402, ought to be followed. Such also may be presumed to have been the opinion of the Lords Justices, who, in affirming that decision on appeal, (a) expressed no dissent from the Vice-Chancellor's *ratio decidendi*. Next, as to the second point: stat. 15 & 16 Vict. c. 79, s. 13, enacts that "when any person by whom any encroachment or enclosure, of whatever value, which, under" stat. 8 & 9 Vict. c. 118, "shall be deemed to be parcel of the land subject to be enclosed, shall be actually occupied, shall neglect or refuse to quit and deliver up possession of the same, or any part thereof, to the valuer acting in the matter of the enclosure, within one calendar month next after the determination of claims under" stat. 8 & 9 Vict. c. 118, "the possession thereof may be recovered by such valuer under the provisions of" stat. 1 & 2 Vict. c. 74. Having regard to the enactments of stat. 8 & 9 Vict. c. 118, it is clear that land included in the map annexed to the provisional order of the Commissioners must, under that Act, be "deemed to be parcel of the land subject to be enclosed." [BLACKBURN, J.—Does not sect. 13 of stat. 15 & 16 Vict. c. 79, refer only to encroachments made within twenty years; which, by stat. 8 & 9 Vict. c. 118, s. 50, "shall be *deemed parcel of the land subject to be enclosed"? [*13 By sect. 49 of stat. 8 & 9 Vict. c. 118, the valuer is expressly disabled from determining title to land.] If the valuer has decided wrongly, his determination can be reversed on appeal. [BLACKBURN, J.—But must he not, in order to show his right to the interference of the justices, prove before them that the land in question was subject to be enclosed, under sect. 50 of stat. 8 & 9 Vict. c. 118? The proceedings before the justices are to be under the provisions of stat. 1 & 2 Vict. c. 74; and under that Act a landlord seeking to recover possession of a small tenement must prove before the justices a tenancy and a holding over by the tenant, in order to give the justices jurisdiction.] Lastly, assuming that the valuer's determination was not conclusive, it was right upon the facts; and the justices were wrong in reversing it.

Karslake, contra.—The justices had jurisdiction to inquire into the matter, and they came to a right conclusion. Upon the finding, the piece of land in question must be considered to be *de facto* an ancient enclosure; and sect. 11 of stat. 8 & 9 Vict. c. 118, which enumerates the descriptions of land subject to be enclosed under the Act, does not comprehend ancient enclosures. It cannot be said that all land included in the map annexed to the Commissioners' provisional order for enclosure is thereby to be conclusively deemed to be land subject to enclosure: otherwise, any part of the New Forest or of the Forest of Dean might become subject to enclosure if put into such a map; whereas sect. 13 of the Act excepts those forests from its operation. The facts in evidence before the justices showed that the land in question in the present case was an ancient enclosure *within [*14 sect. 52, having been enclosed for more than twenty years before

the first meeting of the Commissioners. Sect. 50 shows that the only encroachments upon land which are subject to enclosure are encroachments made within twenty years of that meeting. By sect. 86 ancient enclosures cannot be enclosed without the written consent of the person interested in them. Sects. 47, 48, 55 and 56, which relate to claims before the valuer by persons setting up some right or interest in lands proposed to be enclosed; the determination of those claims by the valuer; and the appeal from him to the Commissioners, and from the Commissioners to the Assizes; apply only to claims relating to rights in lands which the Commissioners have power to enclose, and have no bearing on the claim of an owner of land to prevent its enclosure altogether. By stat. 15 & 16 Vict. c. 79, s. 13, the valuer is empowered to recover possession of "any encroachment or enclosure" "which under" stat. 8 & 9 Vict. c. 118, "shall be deemed to be parcel of the land subject to be enclosed:" by which must be meant, not all encroachments or enclosures that the Commissioners may choose to insert in their map, but such only as are subject to enclosure: such, that is, by reason of sects. 50 and 52 of the first Act, as are of less than twenty years' standing. *Turner v. Blamire*, 1 Drew. 402, was a motion for an injunction to restrain the Commissioners from confirming the award of their valuer; and the injunction was refused, on the ground that it appeared that the plaintiff had acquiesced in the result of the preliminary inquiry by an assistant Commissioner, namely, that the land in dispute was subject to enclosure. But the fact, proved by the

*15] present respondent, that his land is an ancient *enclosure, shows that the valuer had no jurisdiction whatever to enclose it.

Coleridge, in reply.—Stat. 15 & 16 Vict. c. 79, s. 13, authorizes the valuer to recover land which, under stat. 8 & 9 Vict. c. 118, "shall be deemed to be parcel of the land subject to be enclosed." The question is, by whom must it be so deemed? Surely, by the Commissioners. Assuming, therefore, that the Commissioners, by reason of sects. 50 and 52 of the earlier Act, are wrong in deeming an encroachment of more than twenty years' standing subject to enclosure, still, if they so deem it, their decision is conclusive and cannot be inquired into by the justices. By sect. 55 of the first Act, the valuer is to make out a schedule of the claims which he allows, "after" he "shall have heard and determined all claims and objections which shall have been made in the matter of an enclosure." The proper course, therefore, for an owner of land, who denies that it is subject to enclosure, to adopt, is to go before the valuer and make out the exemption. It is too late to take such an objection after the valuer has heard and determined. [COCKBURN, C. J.—Can the valuer give himself jurisdiction in such a case, by deciding the matter of fact, as to the liability of the land to enclosure, wrongly?] If he has jurisdiction to inquire, he has, also, jurisdiction to determine; and if his determination is wrong the only redress is by an appeal under the statute. The defendant could not, by setting up a question of title, oust the jurisdiction of the justices to give the valuer possession of the land which the defendant was proved to be holding over: *Rees v. Davies*, 4 C. B. N. S. 56 (E. C. L. R. vol. 93).

*16] *COCKBURN, C. J.—I am of opinion that our judgment should be for the respondent. The question is, whether a person who

has obtained a piece of land by encroachment upon land subject to be enclosed, has a right to the possession and also to the property of and in that piece of land, when an enclosure takes place: or whether, if he makes no appeal against the decision of the Commissioners enclosing his land, he is bound by their award although the land was not subject to be dealt with by them at all. It appears to be admitted by the appellant that there is no distinction in principle between this case and that of the enclosure of ordinary freehold land acquired by a more legitimate title than encroachment. Now, having regard to stat. 8 & 9 Vict. c. 118, I think that all its provisions relating to the enclosure of land refer to land which is not only proposed to be but is also subject to be enclosed. It is, in fact, clear that the Legislature could not have contemplated an interference with land the private property of individuals; whether that property be acquired by long encroachment or otherwise. The Act, by sect. 11, sets out the descriptions of land which are to be subject to enclosure. Then follows a scheme for effecting the enclosure. Parties interested in land subject to be enclosed, and desirous of its enclosure, are to apply to the Commissioners, who are then to refer the application to an assistant Commissioner; that he may inquire into the expediency of the proposed enclosure, and hear and consider what has to be said for, and what objections can be urged against it. I think that the "objections" "to the proposed enclosure" mentioned in sect. 25, do not include an objection that the land is not land subject to enclosure; but are restricted to objections against the general expediency of the enclosure. After the assistant Commissioner has reported, a [*17 valuer is to be appointed, to hear and determine the claims of persons claiming any common or other right or interest in any land proposed to be enclosed; and, by sect. 48, his order as to "any doubts or difficulties" "respecting such claims, or any differences" "between any of the claimants touching their respective claims, or the relative proportions of their rights and interests," is to be final unless a party dissatisfied with it appeals to the Commissioners. Then follows, in sect. 50, an important enactment that "encroachments and enclosures" "which shall have been made by any person, from or upon any part of the land proposed to be enclosed, within twenty years next before the first meeting for the examination of claims in the matter of the enclosure," "shall be deemed parcel of the land subject to be enclosed." And, by sect. 52, encroachments of twenty years' standing are to be deemed ancient enclosures for the purposes of the Act. Sect. 56 is very material. It gives a right of appeal to "any person claiming to be interested in any land proposed to be enclosed," from "any determination of the Commissioners or assistant Commissioner concerning any claim or interest in or to the land proposed to be enclosed under the powers" of the Act. To me, this section appears to be merely the sequel to sect. 48, which gives an appeal from the valuer to the Commissioners. Sect. 56 gives the like appeal from the determination of the Commissioners; an appeal, as it seems to me, founded upon the same grounds as that under sect. 48. I do not see how it can apply to an objection, such as the present, that the land is not subject to enclosure at all; raised by a person who has

*18] *never made any claim or objection at all before the valuer, and has never appealed from him to the Commissioners. There is no provision in the Act giving such a person any appeal at all. The whole scope of the Act is to confer powers for enclosing land subject to be enclosed; and nothing short of a very express enactment would justify us in holding that it gives the Commissioners jurisdiction to decide questions of title, and of the private right to their property of the owners of land not so subject. The Legislature has not empowered the Commissioners to finally decide whether an encroachment is of twenty years' standing or of less. If it is of twenty years' standing, the Commissioners cannot bind the person whose land it is, by finding, contrary to the fact, that it is of less.

WIGHTMAN, J.—This question arises on a proceeding under stat. 15 & 16 Vict. c. 79, s. 13, by which the appellant, the valuer, sought before justices to recover possession of an encroachment upon land subject to be enclosed, and which was occupied and held over by the respondent, in the same manner as is provided by stat. 1 & 2 Vict. c. 74, for the recovery of the possession of small tenements from tenants. The valuer contended that the encroachment in question was to "be deemed to be parcel of the land subject to be enclosed," under stat. 8 & 9 Vict. c. 118: and the justices entered into the preliminary inquiry whether it was properly so deemed: whether, that is, it in fact was parcel of such land. I think that the justices had full right to institute that inquiry. It is said by the appellant, that the question of parcel or no parcel had been conclusively determined already, by the

*19] insertion of the encroachment in the *map of the enclosure, as parcel of the land to be enclosed; no objection to or appeal against such insertion having been made by the respondent at any time before the map appeared. This brings us to consider the provisions of stat. 8 & 9 Vict. c. 118. In so doing, we must take the fact to be found that this encroachment was of more than twenty years' standing before the Commissioners' first meeting; and that it therefore is, by reason of sect. 52, to be deemed and taken to be an ancient enclosure. [His Lordship read the section.] From that section it would seem that the encroachment was not land subject to be enclosed. Sect. 47, which relates to claims to be sent in to the valuer, applies only to claims of right in alieno solo. Mr. Coleridge appears to admit that; but to contend that the respondent ought to have taken his objection before the valuer, obtained his determination upon it, and had the matter reheard by the Commissioners or an assistant Commissioner, under sect. 55. Sect. 49, however, provides that nothing in the Act "shall extend to enable the valuer, or the Commissioners, or any assistant Commissioner, to determine the title of any lands, or to determine any right between any parties contrary to the actual possession of any such party (except in cases of encroachment as hereinafter mentioned)." In the course of the argument I was struck with the necessity of ascertaining to what the exception there mentioned applies; and I think that it applies to cases of encroachment the title to which depends upon lapse of time; and that it is confined to encroachments falling under sect. 50, as being of less than twenty years' standing, and not to those falling under sect. 52. No doubt the valuer may deal with any part of an encroachment which

is proved *to have been made within twenty years, though the rest of it is within the protection of sect. 52. But no such [*20 question arises in the present case. The entire encroachment having been made more than twenty years ago, it is an ancient enclosure, and the valuer had no power to enclose it either in whole or in part.

(CROMPTON, J., was absent.)

BLACKBURN, J.—I am of the same opinion. Stat. 8 & 9 Vict. c. 118, by sect. 11, defines what are lands subject to be enclosed, and it thence appears that they are lands subject to rights of common. Sect. 25 provides for an application to the Commissioners, with a view to an enclosure, by persons interested in such land. It may often happen, as it did in *Turner v. Blamire*, 1 Drew. 402, (a) that a dispute arises whether part of the land proposed to be enclosed is subject to enclosure or not. And I am far from saying that it might not have been expedient to give the Commissioners power to decide what lands were, and what were not, so subject; and to make their decision, subject to an appeal, final. But I fail to find any provision to that effect in the Act. The "objections" to the enclosure, into which the assistant Commissioner is, by sect. 25, to inquire, do not appear to me to apply to a dispute as to whether the land proposed to be enclosed is subject to enclosure or not. Sect. 49 prohibits the valuer and Commissioners from determining any question of title to land, "except in cases of encroachment as hereinafter mentioned;" except, that is, in cases of encroachment for less than twenty years, which fall under *the [*21 operation of sect. 50. There is nothing to show that the Commissioners may conclusively give themselves jurisdiction by finding, contrary to the fact, that an encroachment is of less than twenty years' standing. That being so, I think that the justices have power, at the hearing of an application to them by the valuer, under stat. 15 & 16 Vict. c. 79, s. 13, to determine the fact which settles whether or not the encroachment, possession of which he seeks to recover, is to be deemed to be parcel of the land subject to be enclosed; the fact, namely, whether or not the encroachment took place within the last twenty years. Then arises the question whether they were precluded from determining in favour of the respondent by the circumstance that the encroachment in dispute was inserted in the Commissioners' map of the lands to be enclosed. But, as I have already said, however desirable it might have been to make the Commissioners' decision conclusive, I find no power given to them by the Act finally to determine such a matter; and such a power could only be given them by express enactment.

Judgment for the respondent.

(a) Judgment affirmed on appeal by the Lords Justices, 22 L. J. N. S. Ch. 766.

*22]

*SMITH v. MUNDY. *June 1.*

The property in the halves of bank notes, sent in payment of a debt due to the receiver from a third person, with an intention on the part of both sender and receiver that the other halves are to follow, remains in the sender until he sends the second halves; the payment being, until then, inchoate and conditional. It is therefore open to the sender, at any time before sending the second halves, to disaffirm the transaction and redemand the first halves from the receiver; who is liable to an action for refusing to return them.

SPECIAL case stated, after writ issued and without pleadings, by consent and by order of Blackburn, J.

The action was brought by the plaintiff against the defendant for the non-return by the defendant to the plaintiff of the half parts of two Bank of England notes of the plaintiff, one for 20*l.* and the other for 10*l.*, which had been sent by the plaintiff to and received by the defendant, and which the plaintiff alleged the defendant was bound to redeliver to the plaintiff on request, which was made; and also for the wrongful conversion by the defendant of the plaintiff's said half parts of the said two Bank of England notes; and also for the detention from the plaintiff of his said half parts of the said two notes.

On 12th August, 1859, the plaintiff entered into an agreement with one George Williams, of Esperanza, Torquay, in the county of Devon, for entering into a partnership with the said G. Williams, in regard to certain furnished houses at Torquay, of which the said G. Williams was possessed. The following is a copy of the agreement.

"Esperanza, Torquay, South Devon.

"Memorandum of agreement made this 12th day of August, 1859, between George Williams, of Esperanza, Torquay, South Devon, on the one part, and George Smith, of 124 Great Dover Road, London, on the other part; that is to say, that the house Esperanza is under *23] lease to the above named George Williams for a term of *7, 14, and 21 years, at a rental of 91*l.* per annum; so likewise is the house Albyn Lodge, at a rental of 90*l.* per annum; so likewise is the house called Cambourne, at the rental of 130*l.* yearly. The said George Williams assures George Smith that his liabilities for furnishing the said houses do not exceed 700*l.*, their original cost being 1000*l.*; that the said George Williams agrees to accept of the said George Smith as a partner, to share equally the profits and liabilities in connection with the said houses, on condition of his paying into a bank, at Torquay or elsewhere, to the joint credit of the above named partners, the sum of 500*l.* This paper to be binding on each until a deed of partnership is executed.

"GEORGE WILLIAMS.

"GEORGE SMITH."

"Witness, Alice Williams."

The sum of 500*l.* has never been paid by the said George Smith into any bank, at Torquay or elsewhere, to the joint credit or otherwise. At the time of the making of the said agreement Williams represented to the plaintiff that he was under certain liabilities, and owed certain debts in respect to the furnishing of the said houses; and that, amongst others, he owed the defendant, who was a china and glass merchant at Bristol, 85*l.* for china and glass which had been supplied by the defendant to Williams for furnishing the said houses.

On the 17th August, 1859, the plaintiff wrote, addressed, and sent by post to the defendant a letter of which the following is a copy.

"124, Great Dover Road,
S. E. London, Aug. 17, 1859.

"Mr. THOS. G. MUNDY.

"Sir. I presume Mr. George Williams, of Esperanza, *Tor-quay, has informed you of my having joined him in his line of [*24 business, and that the debts contracted after this date will be in the joint names of Williams and Smith. I enclose you half-notes for 35*l.*, and in acknowledging the same please forward me a statement of the full amount due to you by Mr. Williams, and oblige

"Your obedient servant,

"GEORGE SMITH."

"P.S.—I find I have not a 5*l.* note, but will enclose it in next.

"No. 80,730, March 20, 1859 £20

"No. 85,543, June 20, 1859 10

£30."

The half-notes for 30*l.*, referred to in the above letter, were the halves of two Bank of England notes, and the same were enclosed in the said letter and sent therein by post to the defendant. The numbers and description of the halves of the said two notes so enclosed and sent in the said letter to the defendant were and are as follows. No. 80,730, dated 20th March, 1859, for 20*l.*; also, No. 85,543, dated 20th June, 1859, for 10*l.*

The above-mentioned letter, and the said halves of the said two Bank of England notes enclosed therein, were duly received by the defendant. They were sent to the defendant with the sanction and authority of the said George Williams. The said notes were the notes of the plaintiff at the time of the sending the same; and at that time, and at the time of the receipt by the defendant of the halves of the said two notes, the plaintiff was under no other contract or liability than that, if any, shown by the said agreement, together with the facts above stated, to send the same; nor was the plaintiff under any *obligation, except as aforesaid, to pay the defendant the said [*25 debt so due to him from the said G. Williams, or any part thereof. On 18th August, 1859, the defendant, on receipt of the said letter, wrote and, paying the postage, sent by post to the plaintiff, who in due course received from him, a letter of which the following is a copy.

"August 18th, 1859.

"Sir. I am in receipt of your favour enclosing the first half of a twenty and a ten pound note, and on receipt of the second halves will send a stamped acknowledgment. According to your request, I herewith enclose a statement of account due from Mr. Williams for goods sent: also the amount, as near as I can at present give, of the goods which are selected to be sent for the new house.

"I am, Sir, yours, &c.,

"THOS. G. MUNDY.

"Amount of account against Mr. Williams, 29*l.* 8*s.* 3*d.*

"The amount of goods selected for the new house amounts to from 55*l.* to 60*l.*"

None of such goods mentioned in such letter, excepting the 29*l.* 8*s.* 8*d.*, which had been supplied previously to the said agreement, were supplied to the said George Williams or to the plaintiff.

On 19th August, 1859, the plaintiff wrote, addressed, and sent by post to the defendant, who duly received, a letter of which the following is a copy.

"Mr. T. G. MUNDY,

"124, Great Dover Road, S. E. London, Aug. 18, 1859.

"Sir,—I beg to request that no goods be debited to me, or use made of half-notes I sent to you, until you again hear from me.

"Your obedient Servant,

"GEORGE SMITH."

*26] *The half-notes referred to in the last letter were the halves of the said two Bank of England notes sent by the plaintiff to and received by the defendant as hereinbefore mentioned.

On 22d August, 1859, the plaintiff wrote, addressed, and sent by post to the defendant, who duly received the same, a letter of which the following is a copy.

"Mr. T. G. MUNDY.

"London, August 22, 1859.

"Sir. In consequence of having withdrawn from any partnership with Mr. Williams, of Torquay, I request the return of the half-notes I sent to you on the 17th instant, for 80*l.*

"And oblige, yours, &c.,

"GEORGE SMITH.

No. 80,730 . . .	£20
85,543 . . .	£10

—
£30."

At this time the defendant had no knowledge that the said agreement of 12th August, 1859, subsisted between the plaintiff and the said George Williams. The half-notes referred to in the last letter were the halves of the said two Bank of England notes sent by the plaintiff to and received by the defendant as hereinbefore mentioned.

On 21st December, 1859, one Henry Gribble, being the plaintiff's agent and duly authorized by the plaintiff so to do, verbally demanded of the defendant, and required the defendant to deliver to him, for the plaintiff, the said halves of the said two Bank of England notes. The defendant on that occasion refused, and has ever since refused, to deliver the said halves of the said two notes either to the plaintiff or to his said agent, and the defendant claims a right to retain the same.

*27] The said Henry Gribble, at the time he made the *aforesaid demand, also served the defendant with a written demand, duly signed by the plaintiff. The defendant has refused to comply with such written notice and demand, and still retains and claims a right to retain the said halves of the said two notes.

The question for the opinion of the Court was, Whether the plaintiff was entitled to recover from the defendant the said halves of the said two Bank of England notes, or their value.

Macnamara, for the plaintiff.—The plaintiff is entitled to recover. The case is one of the first impression: but, on principle, the plaintiff's right is clear. Nothing has taken place between him and the defendant which can operate to divest the plaintiff of the property in

the half-notes sent to the defendant. The sending them was not payment of the debt due from Williams, but only a step towards payment. It was an inchoate and incomplete act. The defendant himself treats it as such, in his letter of 18th August, 1859, by which, after acknowledging the receipt of the half-notes, he states that he will send a stamped acknowledgment on receipt of the second halves. Williams, if sued by the defendant for the original debt, could not have made out a plea of payment by proof that the half notes had been sent by the present plaintiff to the defendant on account of it; nor could the defendant sue the plaintiff for not sending the second halves. Again, it is clear that there was no gift of the half-notes by the plaintiff to the defendant; nor was there any contract between them, or any consideration for the passing of the property in the half-notes to the defendant. The transaction amounted to no more than a conditional delivery of the first halves; *it is as though the plaintiff had [*28 said to the defendant, "I intend these halves to be yours, when I send you the others, and you accept them in payment." There is no such thing in law as a qualified or partial passing of the property in a thing: it must either pass altogether or not at all. Tried by this test, the property in the half-notes sent remained in the plaintiff. If the whole debt due to the defendant had been afterwards paid in cash, the plaintiff could, clearly, have recovered back the half-notes. *Hough v. May*, 4 A. & E. 954 (E. C. L. R. vol. 81), decides that there cannot be a conditional payment. The defendant in that case relied, in support of a plea of payment to, and acceptance of the sum paid in satisfaction by, the plaintiffs, on a check which he had sent to them, which, in the body of it, was stated to be for "balance account;" but the Court held that, to make the delivery of the check a payment, it should at least be unconditional. *Littledale, J.*, in giving judgment, said, "The case would be different, if the plaintiffs had received the check as money; but all that appears is, that it was sent to them by the defendant. They say, 'we never authorized the sending of this check to us, and we shall commence an action.' Perhaps a party ought, under such circumstances, to send the check back; but here the plaintiffs offer to do so; and they were not bound to suspend the commencement of the action till they had returned the check. Again, I rather think that the condition inserted in the check might be evidence against the plaintiffs, if they presented it." These dicta tend to show that, in the present case, the property in the notes would not have passed to the *defendant till he had [*29 accepted them as payment, even had the plaintiff sent the whole notes to him. If one party to a pending contract sends the other, in the course of the negotiation, a document intended as a means of carrying out the contract, the right to the document reverts to the sender if the contract goes off. *Roberts v. Wyatt*, 2 Taunt. 268, 275, so decides; it being there held that, upon a contract for the sale of an estate, the title and abstract to be made at the vendor's expense, the purchaser is entitled to the custody of the abstract until either the purchase is finally rescinded by consent, or declared impracticable by a Court of equity; but that, when the contract is determined, the abstract becomes the property of the vendor. In that case the contract was still open and therefore the plaintiff,

the purchaser, was held entitled to recover, in trover, the abstract originally sent to him by the defendant, the vendor's solicitor, returned, with numerous queries, by the plaintiff to the defendant, and which the defendant refused to redeliver, on the ground that he could not clear up the plaintiff's objections. Sir James Mansfield, C. J., however, in giving judgment, said, "It is clear that the plaintiff had, not a special, but a temporary property in the abstract, that is, till the contract is disposed of; and then, I think, it reverts to the vendor." So, in the present case, as soon as his contract with Williams was at an end, the plaintiff became absolutely entitled to the half-notes in the defendant's possession. To the same effect is *Esdaile v. Oxenham*, 8 B. & C. 225 (E. C. L. R. vol. 10); where the plaintiff, an intending purchaser of an estate, was held entitled, after abandoning the contract of purchase, to recover in trover from the

*80] defendant, an attorney, the deeds of conveyance of the estate, which had been prepared at the plaintiff's expense, sent by him to and executed by the vendor, refused execution by other necessary parties, and had come into the possession of the defendant, who refused to deliver them up, claiming to have a lien upon them for professional business done for the vendor.

J. D. Coleridge, for the defendant.—The defendant is entitled to keep the half-notes. First, upon the facts as stated in the case, there was a good and binding contract between the parties, which has been in part performed. Secondly, the plaintiff, when he sent the half-notes, intended to part with the property in them, and the defendant accepted them unconditionally. Thirdly, the transaction was in effect a payment by Williams, through the plaintiff as his agent, of the debt due from Williams to the defendant. The plaintiff sent the half-notes, with that object, and with the sanction of Williams, at a time when there was a subsisting agreement for a partnership between him and Williams. The first halves were sent in payment; and no other condition was attached to the payment than that the defendant should accept the other halves in completion of it. [WIGHTMAN, J.—Can the defendant sue Williams on the ground that the second halves were not sent?] Williams would probably be liable to the defendant, on that ground, in some form of action. But that is not a proper test of the defendant's right to retain the first halves, as against the plaintiff. The defendant is entitled to do so, having accepted them unconditionally. The fact, relied on by the other side, that the defendant, in his letter of 18th August, 1859, promises to send a *31] stamped receipt in acknowledgment *of the second halves, when he gets them, does not show that he had not finally accepted the first halves. [COCKBURN, C. J.—Suppose that the plaintiff, after sending the first halves, had lost the others, could he not have told the defendant of the loss, and offered him thirty sovereigns instead of the remaining half-notes? And could the defendant then have refused such an offer, and sued the plaintiff for not delivering the other halves? BLACKBURN, J.—Can you suppose that the parties intended or contemplated that the defendant should possibly become the owner of worthless half-notes?] The Bank of England, if satisfied of the loss of the remaining halves, would pay the notes. Suppose, on the other hand, that, instead of half-notes, the plaintiff had

sent the defendant half of a five sovereign piece; surely the defendant would have been entitled to retain that piece. The intention of the parties can hardly be an element in the discussion; events having happened which were not in their contemplation. The question is, what is the effect, in law, of what has been done? [BLACKBURN, J.—Then you must contend that there is something in law by which the property would pass, irrespective of the intention.] If anything turns upon the intention, it is evident that the plaintiff, when he sent the first halves, never thought of having them back. [WIGHTMAN, J.—He never intended that those halves, alone, should be kept by the defendant.] The act of sending them almost amounted to a gift.

Macnamara was not called upon to reply.

COCKBURN, C. J.—I think that our judgment must be for the plaintiff. The case is novel and somewhat *curious; but when the question is closely looked into all difficulties disappear. It [*32 seems that the plaintiff, having entered into a contract for a partnership with Williams, agreed with him to discharge the debt which he owed to the defendant; and the plaintiff accordingly sent the two half Bank notes to the defendant. The arrangement with Williams for the partnership having gone off, the plaintiff declines to send the remaining halves, and calls on the defendant to return those already sent. The defendant refuses, on the ground that the plaintiff has parted with the property in those halves; and the question is, whether the plaintiff has in fact done so. This depends upon what was the intention of the parties, respectively, in sending and in receiving the half-notes. Now I think that the intention of the plaintiff was to liquidate Williams's debt to the defendant, and that he parted with the half-notes only in a manner co-extensive with that purpose. By sending the half-notes he did not extinguish Williams's liability. The case would have presented a different aspect had the defendant, on receiving the half-notes, agreed to exonerate Williams altogether, and to look only to the plaintiff. But in the actual state of facts there is nothing to prevent the defendant from proceeding against Williams, and treating the defendant's acceptance of the half-notes as a mere inchoate and conditional payment, to be completed only on the arrival of the other halves. Indeed, he guards himself against being supposed to treat the first halves as payment, by writing to the plaintiff and promising to send a stamped acknowledgment on receiving the second halves. Nor can the plaintiff have intended that Williams should be relieved from liability to the defendant till the second halves had been sent. It appears to me, therefore, *that the transfer [*33 of the first halves to the defendant was intended by both parties to be inchoate, not complete; and not so to vest the property in them in the defendant, that he could, under any circumstances, insist upon keeping them and refuse to redeliver them to the plaintiff.

WIGHTMAN, J.—I am of opinion that no absolute property in the half-notes passed to the defendant. Neither the plaintiff nor the defendant intended that they should be treated as payment, or half-payment, of Williams's debt. As long as it remained doubtful whether the defendant would receive the remaining halves, the defendant might have brought an action against Williams for the debt, in which a plea of payment could not have been supported. It seems

to me, therefore, that the absolute right to the first halves never passed from the plaintiff to the defendant.

(CROMPTON, J., was absent.)

BLACKBURN, J.—I am of the same opinion. Till the payment should be complete, the half-notes sent to the defendant remained the property of the plaintiff. It clearly was not the intention of either party that each of them should have the property in the halves in his possession. The circumstance that the notes were cut into halves may be regarded as a mere accident. Suppose that the plaintiff had held out a whole note to the defendant, and that the defendant had taken hold of it, the property in it would not have passed to the defendant until the plaintiff had entirely relinquished his hold. So *34] long as the plaintiff retained a partial control *over the note, he would have been at liberty to change his mind and refuse to hand it completely over to the defendant. So, in the present case, there could be no change in the property in the notes till both halves had come into the defendant's possession.

Judgment for the plaintiff.

In the matter of FRANCIS BLAKE, Gentleman, one, &c. *June 26.*

The summary jurisdiction of the Court over its attorneys is not limited to cases in which they have been guilty of misconduct such as amounts to an indictable offence, or arises in the ordinary course of their professional practice; but extends to all cases of gross misconduct, on their part, in any matter in which they may, from its nature, fairly be presumed to have been employed in consequence of their professional character.

B. lent money to an attorney, whom he had previously known and employed as such, on the security of the attorney's promissory note for the amount, and of the deposit by the attorney of a deed of assignment to him of a mortgage on an estate in Ireland, by which a greater amount than B.'s loan was secured to the attorney. The estate getting into the Irish Encumbered Estates Court, the attorney borrowed the deed of B. for the purpose, as he alleged to B., of supporting his claim in that Court, but in reality in order to obtain from that Court payment of the amount secured to him by the deed. Having, by production of the deed to the Court, established his right to that payment, he returned the deed to B., and afterwards received out of Court the whole of the amount which he claimed. He never informed B. of this, but appropriated the whole amount to his own purposes, and continued for several years afterwards to pay B. interest on his loan. He then became insolvent, and B. in consequence lost the whole of the money advanced by him.

Upon these facts the Court, holding that the attorney had been guilty of gross misconduct, suspended him from practising for two years.

GARTH had obtained a rule on behalf of The Incorporated Law Society, calling upon Francis Blake, an attorney of this Court, to show cause why he should not be struck off the roll of attorneys of this Court, or why he should not answer the matters charged in the affidavits.

The matter was referred to the Master, to examine into and report on the charges alleged against Blake. The Master reported that the charges resolved themselves into three cases, in two of which the motion was not pressed, and they are therefore here omitted. In the third, which may be called Beevir's case, as to which the Court was prayed to make the rule absolute, the Master's report was as follows:—

*35] “In this case the acquaintance between the parties commenced as long back as 1880, Beevirs's brother having been at first servant

and afterwards farm-bailiff to Blake, on his property at Rickmansworth. In April, 1846, Beevirs, while on a visit to his brother at Rickmansworth, mentioned to Blake that he had some spare money at his disposal. In consequence of what then passed, he called at Blake's office on 7th April, and handed to him 1000*l.*, and received as security Blake's promissory note for 1000*l.*, and, as an equitable deposit, a deed of assignment to Blake by George Gordon Smith, of a share, amounting to 8125*l.*, of a large mortgage on estates in Ireland, as a security to Blake for a sum not exceeding 2000*l.* It is not clear whether the deed was deposited with Beevirs as security for the whole 1000*l.* or only for 700*l.*; probably the latter sum. Beevirs states that, up to this time, Blake had acted as his solicitor, and that he had no other legal adviser; but admits that, about a week after the loan, he consulted Mr. Fitch, a solicitor, who told him the security was good. Blake admits he was so employed by Beevirs as his solicitor, but that he was so employed only on two or three occasions during the whole of the acquaintance, and this is not contradicted. On 15th December, 1847, Blake wrote to Beevirs as follows:—

"Dear Sir. I have received a letter from Dublin to-day, requesting me to send over for a few days my mortgage-deed in your possession, for production before the Master in Chancery there, in support of my claim; and I shall feel much obliged if you will let me have it for a few days, giving you my undertaking to return it. Yours truly,
FRANCIS BLAKE."

*The deed was accordingly lent, and returned in a few days. Subsequently, Blake applied for the loan of the deed a second time, [36 and it was again lent and returned. By the production of the deed on one or other of these occasions, before the Master in Chancery in Ireland, he was enabled to make his report; and the necessity of again producing it to obtain the money was dispensed with. In December, 1850, Blake applied to Beevirs again for the deed, in order that Blake might raise more money upon it. Beevirs, it appears, at first assented; but afterwards refused, on the ground that he might himself want to raise money upon it. In August, 1852, the money being receivable from the Encumbered Estates Court in Ireland, Blake went to Dublin and received the money due to him upon the security, namely, 1626*l.* 11*s.* 7*d.* He wholly omitted to communicate the fact to Beevirs, and continued to pay interest on the 1000*l.* down to April, 1855.

The only extenuating circumstances that are suggested on the part of Blake in this case are, that he had a lien upon the mortgaged estates, beyond the 1626*l.* 11*s.* 7*d.*, for a sum of 3000*l.* or 4000*l.* for costs, which (though he afterwards lost his lien) would have enabled him to satisfy Beevirs's claim; that Beevirs gave no notice of his claim to the Court of Chancery or the Encumbered Estates Court; from which he wishes it to be inferred that Beevirs relied chiefly, if not entirely, on his (Blake's) personal security; and that, down to May, 1856, Blake could at any time, at a week or ten days' notice, have repaid Beevirs the 1000*l.*, if he had pressed for it. Blake also states that when, subsequently, in May, 1856, he found his affairs embarrassed, he prepared and engrossed *a mortgage to Beevirs for the [37 amount of his debt, on property (the Matlock Bath Estate) which he then thought was of ample value. Beevirs's assent was never

obtained to this mortgage; in fact, he never knew anything of it, and it was not executed, in consequence, as Blake states, of his being obliged by the pressure of his affairs to leave London suddenly. But the fact remains totally unanswered, that Blake did, in August, 1852, receive from the Encumbered Estates Court 1626*l.* 11*s.* 7*d.* (Beevirs's lien for 1000*l.*, or at least 700*l.*, being still unsatisfied), entirely without the knowledge, and retained it without the assent, of Beevirs; and that, in consequence, upon Blake's insolvency in 1856, Beevirs lost the whole amount of his debt."

It further appeared from the Master's report that Blake, having become insolvent in 1856, filed a petition in the Insolvent Court on 28th February, 1859, and was afterwards remanded by the Court for two years, on the ground of this and other fraudulent debts.

Dowdeswell now showed cause, and cited *Stephens v. Hill*, 10 M. & W. 28.

Garth was heard in support of the rule, and cited *In re King*, 8 Q. B. 129 (E. C. L. R. vol. 55).

The nature of the arguments sufficiently appears from the judgments of the Court.

COCKBURN, C. J.—I am of opinion that Blake is amenable to the summary jurisdiction of this Court, although the misconduct of *88] which he has been guilty *did not arise in a matter strictly between attorney and client, but out of a simple loan transaction. I proceed on the general ground that, where an attorney is shown to have been guilty of gross fraud, although the fraud is neither such as renders him liable to an indictment, nor was committed by him while the relation of attorney and client was subsisting between him and the person defrauded, or in his character as an attorney, this Court will not allow suitors to be exposed to gross fraud and dishonesty at the hands of one of its officers. Upon this principle the present attorney, Blake, must be held responsible, under the circumstances of gross fraud which have been proved against him. Although Beevirs did, in the first instance, apply to him as an attorney, I think that the transaction ultimately resolved itself into one of a mere loan between them as individuals. Beevirs, having a sum of money to invest, applied to Blake, whom he had known as an attorney, to obtain an investment for him. Thereupon Blake offered to borrow the money himself, on the security of his promissory note and the deposit of a mortgage-deed of some Irish property, in the charge on which he had a share. The property in question having afterwards got into the Irish Encumbered Estates Court, Blake borrowed the deed of Beevirs for the purpose, as he alleged, of supporting his claim before that Court. Beevirs, whose station in life was such that he was not likely to be conversant with matters of this kind, gave up the deed. There is nothing to show that the true state of things was explained to him; on the contrary, it may be inferred that Blake concealed from him two important facts: one, that by means of the temporary possession of the deed he, Blake, would be *89] enabled to *receive the money secured to him by it, when the estate was sold by the direction of the Irish Court; the other, that Beevirs might himself intervene, if he thought fit, and get back his money at the same time. Had this information been given to

Beevirs, he, no doubt, would not have parted, as he did, with the deed unconditionally; for we find that, on a subsequent occasion, he refused to part with it in order to enable Blake to raise a further loan. Blake, however, having got possession of the deed, and being fully aware that Beevirs considered it to be a valid subsisting security, obtained by its means the money secured to him, and appropriated the whole amount to his own purposes: and for several years afterwards he kept Beevirs in entire ignorance of the facts; and, by continuing to pay him interest on his loan, led Beevirs to believe that the deed was still a valid and subsisting security. It was urged in extenuation, and may be true, that Blake, at the time he borrowed the deed and obtained the money thereby secured to him, was, and continued for several years to be, able to repay Beevirs at any time, on a very short notice; that, however, is the kind of excuse which is constantly made in cases of embezzlement, and it cannot prevail with us. These being the facts, we are bound so to deal with the attorney as to hold his case out as a warning, and to show our vigilance in protecting persons who may have similar dealings with other attorneys. Although, therefore, we shall not take the extreme course of striking him off the roll, we must visit him with a punishment adequate to his offence, by suspending his certificate for two years from 28th February last.

WIGHTMAN, J.—I am of the same opinion. It is of the [40] *greatest importance that transactions to which attorneys are parties should be *uberrimæ fidei*, and that the conduct of those who are accredited as officers of the Court should be above suspicion. Now, the facts of the present case are that Beevirs first knew Blake as an attorney and solicitor, and employed him as such. Afterwards, having some money for investment, he lent it to Blake, not on his mere personal security, but also on that of the deposit of a mortgage deed. That Beevirs relied upon this deed as a security is shown by his subsequent refusal to let Blake have it for the purpose of raising more money upon it. Blake had previously induced Beevirs to lend it him for the simple purpose, as he falsely stated, of enabling him to make out his claim in the Encumbered Estates Court. Having by this means been enabled to obtain, and having obtained, payment of the money secured to him by the deed, he said not a word to Beevirs about what he had done; but, by continuing to pay him interest on his loan, led him to believe that matters remained on their old footing. This was a transaction so fraudulent as to demand our summary interference.

CROMPTON, J.—The law as to the summary jurisdiction of the Court over attorneys, as its officers, as laid down in the books of practice, is of wider extent than Mr. Dowdeswell is ready to admit. Thus, in Chitty's Archbold's Practice (ed. 11, by Prentice), p. 146, it is stated that "The Court will, in general, interfere in this summary way and strike an attorney off the roll, or otherwise punish him, for gross misconduct, not only in cases where the misconduct has arisen in the course of a suit, or other regular and ordinary business of an attorney, *but where it has arisen in any other matter so connected [41] with his professional character as to afford a fair presumption that he was employed in or intrusted with it in consequence of that

character." So, in Lush's Practice (ed. 2, by Stephen), p. 218, it is laid down that "For any gross misconduct, whether in the course of his professional practice, or otherwise, the Court will expunge the name of the attorney from the roll." In the present case, I cannot say that Blake's fraud was not committed in a matter connected with his professional character. If he did not act in it as an attorney, he at all events took advantage of his professional position to deceive Beevirs.

BLACKBURN, J.—The Court has a jurisdiction, in such cases as the present, to ascertain whether a person accredited as one of its officers is unfit to be so accredited. It is not necessary, in order to induce the Court to interfere in a summary manner, that the misconduct charged should either amount to an indictable offence or arise out of a transaction in which the relation of attorney and client subsists between the attorney and the person against whom he has been guilty of misconduct. Thus, in *Stephens v. Hill*, 10 M. & W. 28, 84, Alderson, B., says, "The question in this case is, whether the attorney has so misconducted himself in his character of an attorney as to be an unfit person to remain on the roll." "If persons are to be accredited by the Court, it is our duty to watch over and control their conduct." And, in *Rex v. Southerton*, 6 East 126, 148, after the Court had held that the facts charged against the defendant, an attorney, did not amount to an indictable offence, Lord Ellenborough, C. J., said "that enough appeared to the Court to satisfy them that the *42] defendant *was a very improper person to remain as an attorney on the rolls of the Court;" and he was accordingly struck off, his counsel admitting that he could not resist it.

Rule absolute to suspend Blake from practising as an attorney of this Court for two years from 28th February, 1860.

The QUEEN on the prosecution of KAY DINSDALE v. The Wardens or Keepers and Assistants of the Mystery or Art of SADDLERS of the City of LONDON. *June 2, 9.*

The charter of The Saddlers' Company empowered the Wardens, or Keepers, and Assistants of the Company to elect Assistants from the Livery; such Assistants to take specified oaths before admission to the exercise of their office. It made the Assistants removable from office by the electing body, for ill government, ill conduct, or any other just and reasonable cause. It imposed certain general restrictions on the eligibility of the members of the Livery as Assistants, and declared that all elections contrary to its directions and restrictions should be void. It then gave power to the Wardens, &c., to make such by-laws as should seem to them salutary, honourable, and necessary for the good government of the Company, its members and officers.

By the usage of the Company, persons elected Assistants were eligible to further offices in a routine ending with the office of Warden. The Assistants did not receive or take charge of the Company's funds: but the Rentier Warden (whose office was the first in order to which an Assistant was eligible) did, being in fact the treasurer. The Wardens, &c., in 1799, duly made a by-law "That no person who has been a bankrupt or become otherwise insolvent, shall hereafter be admitted a member of the Court of Assistants of this Company, unless it be proved to the satisfaction of the Court that such person, after his bankruptcy or insolvency, has paid and satisfied his creditors the whole of their debts, or shall have established a fair and honourable character for seven years subsequent to such his bankruptcy or insolvency, to the satisfaction of the Court or the majority of them."

D., a member of the Livery, but in insolvent circumstances, was elected, in manner pursuant to the charter, an Assistant of the Company. Afterwards, before he knew of

his election and before his admission to the office, he made a representation to the clerk of the Company, false to his own knowledge, that he was solvent. He was then sworn in and admitted, and acted in the office. Being afterwards adjudged bankrupt, and his false representation of his circumstances having been communicated by the clerk to the Wardens, &c., of the Company, the latter, at a meeting duly held, but of which they gave D., and of which he had, no notice, removed him from his office.

These facts having been found by special verdict, at the trial of issues raised on a mandamus commanding the Wardens, &c., of the Company to restore D. to the office: Held, that D. was entitled to a peremptory mandamus, both on the ground that the by-law of 1799 was bad, first, as imposing an unreasonable disqualification on eligibility to the office; and, secondly, as limiting the disqualification imposed to admission, instead of extending it to election, to the office; and also on the ground that, assuming D.'s misrepresentation to have amounted to a corporate offence, which would justify his motion, he could not be removed without notice and without being heard; nor could his title to the office be tried by a proceeding other than a quo warranto.

Judgment reversed in the Exchequer Chamber; where held that the by-law was good in substance; for that the disqualification of a bankrupt or insolvent for office in the Company was not unreasonable, having regard to the nature and constitution of the Company; and that the disqualification did not violate the charter by unduly restricting the class from which the Assistants were eligible. Held, further, that the by-law was good in form; for that, properly construed, it invalidated the election, no less than the admission, of a disqualified person. Held lastly, that granting that D., if in his office, could not have been removed unheard from it for a corporate offence, the facts that he was from the beginning disqualified by the by-law for the office, and that he procured his admittance to it by fraud, showed that he never was properly in, and had no right to be restored to, it.

MANDAMUS to "The Wardens, or Keepers, and Assistants of the Mystery or Art of Saddlers of *the City of London," reciting at length letters patent of King Charles the Second, dated 24th [*43] December, in the thirty-sixth year of his reign, being the charter of incorporation of The Saddlers' Company; that on 20th October, 1849, there being then a vacancy in the office and number of Assistants of the said Company, the prosecutor, Kay Dinsdale, then being a freeman and liveryman and one of the commonalty of the said Company, and duly qualified in that behalf, was at a meeting or assembly of the Wardens, or Keepers, and Assistants of the said Art or Mystery, duly held and convened by the said Wardens, or Keepers, and Assistants, duly elected and nominated and constituted one of the Assistants of the Mystery or Art aforesaid; and, being so elected, duly took the oaths and made and subscribed the declaration and paid the fees by the said letters patent and the laws of the realm and the laws and ordinances of the said Company prescribed in that behalf, and was thereupon duly admitted to the office of, and became and was and acted as, and duly executed the office of one of the Assistants of the Mystery or Art aforesaid, and continued to be and to act as such Assistant from thence until the removal thereafter *mentioned; and that [*44] afterwards, on 20th December, 1849, although he had not ill-conducted himself, and although he was then duly in and entitled to hold his said office, and no just or reasonable cause existed for his removal therefrom, the defendants wrongfully, unlawfully and against his will, contrary to the tenor of the said letters patent, and without any just or reasonable cause in that behalf, removed, expelled, and dispossessed him from the said office, and had from thence hitherto wrongfully, unlawfully and against his will kept him so removed, expelled, and dispossessed, and had prevented him from filling or executing his said office, and deprived him of all the liberties, privileges, franchises, and benefits to the said office pertaining.

The mandamus then commanded the defendants to restore the prosecutor to his said office, or show cause to the contrary.

The return alleged that the said letters patent were not fully or truly set forth in the writ, but that divers material portions thereof were omitted, and that in the said letters patent it was contained and provided that every election of any Assistant of the said Corporation, contrary to the directions and restrictions in the said letters patent in that behalf contained, should be void and of no effect; that the prosecutor was not duly qualified to be elected; that he was not duly elected, nominated, or constituted one of the Assistants of the Company; that he had ill-conducted himself and was not duly in, or entitled to hold, his said office; that there was just and reasonable cause for his removal, and for which he was removed; and that the defendants did not wrongfully or unlawfully, or contrary to the tenor of the said letters patent, or without just or reasonable cause in

*45] that behalf, remove and keep him removed. That the Company, at the time of the said charter and ever since, have had considerable property and effects, real and personal, and have had the management and care of divers charity and other estates, and the distribution for charitable and other purposes of divers moneys; that, since the granting of the said charter, the Wardens of the Company had been and were elected annually, by ballot, by the Court of Assistants, and from the members constituting that Court; that, by the usage of the Company, a member of that Court was elected in ordinary course to the following offices, namely, first, that of Renter Warden, after serving which for one year he falls back upon the Court of Assistants, and is then successively elected to serve the offices of Quarter Warden, Key Warden, and Prime Warden, or Master, his promotion being regulated by his seniority. That in the Courts the Prime Warden, usually called Master, presides, and has a casting vote in cases of equality of votes. That the Key Warden has the care of the common seal and archives of the Company. That the Quarter Warden acts as receiver of the quarterage, which he pays over to the Renter Warden. That the Renter Warden is the acting treasurer of the Company, performs this duty in person, and receives into his hands and has the sole custody or charge of all the rents, dividends, moneys, plate, linen, goods, chattels and effects of the Company, and its charity and trust estates; having to account to the auditors appointed by the Court of Assistants. That the Assistants attend to the general affairs of the Company, and have the uncontrolled spending of its moneys, the granting of pensions and relief to its decayed members, and the general government of the Corporation and the

*46] trade, and have *and exercise the right of search for deceitfully wrought wares appertaining to the trade of a saddler, and to seize and destroy the same. That the election of new members of the Court of Assistants, when vacancies occur, is made by the Court of Master, Wardens and Assistants, from the Livery, according to seniority, if in a state of solvency, and of good character and repute; and they hold office for life; but in case of misconduct, rendering them unfit, or other sufficient cause, or receiving parochial aid, or petitioning the Court for relief, they would cease to receive their summonses to attend the Court. That, should a member of the Court

come to decay and petition to be relieved out of the funds of the Company, it is understood as a matter of course that, after he has received his first quarter's pension, he is no longer to be summoned to the Court, and at the following Court a member moves that there be a call from the Livery to supply the vacancy; but the party so removed is not deprived of his Livery. That the same course has been pursued in case of misconduct amounting to unfitness or incompetency. That, on 28d April, 1799, in pursuance of the power contained in the charter, the Wardens and Assistants of the Company, at a meeting duly convened and constituted, made and ordained a law and ordinance, which has ever since been and still is in force, and is as follows:—"Resolved, that no person who has been a bankrupt or become otherwise insolvent shall hereafter be admitted a member of the Court of Assistants of this Company, unless it be proved to the satisfaction of the Court that such person, after his bankruptcy or insolvency, has paid and satisfied his creditors the whole of their debts, or shall have established a fair and honourable character for seven years subsequent to such his bankruptcy or insolvency, to the *satisfaction of the Court or the majority of [*47 them." That the prosecutor knew of this law, and did, just before the time of his alleged election and admittance, for the purpose of inducing and procuring the then Wardens, or Keepers, and Assistants of the Company to elect and admit him to be an Assistant, falsely and fraudulently represent and state, and cause to be represented and stated, to the said Wardens, or Keepers, and Assistants, that he then was solvent and able to pay his creditors twenty shillings in the pound, whereas, in truth, he then was, and he thence hitherto has been, insolvent, and he then was largely indebted to divers persons, to wit, to the amount of 10,000*l.*, and was wholly unable to pay his creditors 20*s.* in the pound, or any dividend whatever, as he then well knew; and the said creditors never have been paid their said debts, or any part thereof, except a small and insignificant dividend of 2*s.* 8*d.* in the pound, which, and no more, has at length, after great delay, been paid to the said creditors under the bankruptcy hereinafter mentioned; and that, by means of the said false and fraudulent representation, the prosecutor induced and procured the said then Wardens, or Keepers, and Assistants, to elect and admit, and he was then, by and through means of the fraud aforesaid, and not otherwise, elected and admitted as in the writ mentioned. That, at the time of the said representation, and thence until he became bankrupt, the prosecutor was a trader, to wit, a saddler, subject to the statutes concerning bankrupts, and had committed an act of bankruptcy; and that, shortly after the alleged election and admittance, he was adjudicated bankrupt, and assignees in bankruptcy were appointed; and that thereupon, and whilst the prosecutor was such *bankrupt as aforesaid and wholly insolvent, at a [*48 meeting of the Wardens, or Keepers, and Assistants of the Company, duly convened, on 20th December, 1849, it was resolved, for the cause aforesaid, that he should be removed and discharged from being, and should no longer be, one of the Assistants of the Company; and he was then removed and discharged and ceased to be, and at the time of the teste of the writ was not, one of the said Assistants, or

entitled to be admitted as such. Wherefore the defendants ought not to, and could not, restore the prosecutor to the said office of Assistant.

The prosecutor pleaded the following pleas:—

1. That the letters patent are truly set forth in the said writ of mandamus, and that no material portion thereof is omitted as alleged; that prosecutor was duly qualified to be elected an Assistant as in the said writ mentioned in manner and form therein alleged, and that he was duly elected, nominated, and constituted one of the Assistants of the said Mystery, or Art, in manner and form as in the said writ alleged; that he had not ill-conducted himself as in the said return alleged, and was duly in and entitled to hold his said office of Assistant as in the said writ alleged, and that there was no just or reasonable cause for his removal therefrom before or at the time of the alleged removal as in the said return alleged; that the said Corporation did wrongfully and unlawfully, and contrary to the tenor of the said letters patent, and without just or reasonable cause, remove, expel and dispossess prosecutor from his said office, in manner and in form as in the said writ alleged, and that they did and do wrongfully and unlawfully keep him so removed and dispossessed; that no such law or ordinance *49] was made or ordained as in the said return is alleged, *and that the said law or ordinance did not continue to be nor was it in force at the times in the said return in that behalf mentioned, as therein alleged; that prosecutor did not falsely and fraudulently represent or state, or cause to be represented or stated, to the said Wardens, or Keepers, and Assistants, as in the said return in that behalf alleged; and that he was duly elected and admitted as in the said writ mentioned, and not by or through any fraud as in the said return alleged; that the meeting or assembly, in the said return alleged to have been held on 20th December, 1849, was not duly convened as alleged; that prosecutor was not removed or discharged, and did not cease to be, but at the time of the teste of the writ was, and still is, one of the Assistants of the said Art of Mystery, and entitled to be admitted thereto.

2. As to so much of the return as relates to the alleged removal or discharge of prosecutor under the authority of the resolution of the meeting or assembly alleged to have been held on 20th December, 1849: That, although, before and at the time of the said alleged meeting or assembly, he was an Assistant of the said Art or Mystery, and was, as such, entitled to be summoned to the meeting or assembly, and to attend the same, he was not summoned to the said meeting or assembly, nor had he any notice thereof until after the same had been held, nor did he attend the same, nor had he any opportunity of attending the same.

The defendants joined issue on these pleas.

The case came on for trial, before Lord Campbell (then C. J. of this Court), at the sittings in London after Michaelmas Term, 1858, and a special verdict was afterwards settled by him, which, so far as is material, was as follows:—

*50] *That the letters patent granted by King Charles the Second to the defendants, referred to in the writ of mandamus, are in the words and figures set forth in the Latin copy of the charter hereunto annexed.

That, on 23d April, 1849, the following resolution was made and passed by the persons entitled to elect to the office hereinafter mentioned. "It having been resolved and ordered at the last Quarter Court, held on 20th January last, that one of the Livery should be called on the Court of Assistants, it was thereupon resolved that the following gentlemen of the Livery should be put in nomination, whereout to choose one, namely," [here followed several names, of which prosecutor's was one]. "Resolved, that this Court do now proceed to such election, and that the same be by way of scoring; whereupon all the above named being written on a sheet of paper, the scoring opposite to their names took place, when the unanimous choice was declared to have fallen upon Mr. Kay Dinsdale, who was thereupon declared duly elected on the Court of Assistants accordingly." This resolution was confirmed at the subsequent meeting of the Wardens and Assistants, held on 25th July, 1849.

That each of the said Courts was in all respects duly constituted, and competent to elect the said Kay Dinsdale an Assistant of the said Company, and the mode of election was the mode usually adopted in the election of an Assistant of the said Company; but the said resolution was not communicated to the said Kay Dinsdale until after the representations hereinafter referred to had been made, when (that is to say) on 16th October, 1849, he was summoned to attend a Court of the said Art or Mystery as an Assistant of the same.

*That, at the time of the making and passing of the said last mentioned resolution, and from thence continually up to, and at, [*51 the time of the alleged removal of the said Kay Dinsdale from his said office of Assistant, as hereafter mentioned, the said Kay Dinsdale was in insolvent circumstances, and unable to pay his creditors 20s. in the pound; and during all such time he then owed large sums of money, on judgments and otherwise, to divers persons, which debts have always remained unpaid and unsatisfied; but he was in other respects duly qualified to be elected an Assistant.

That the said Kay Dinsdale attended the Court of the Wardens and Assistants, on said 20th October, 1849, in obedience to the said summons, and on that occasion accepted the said office, and was sworn in and acted as an Assistant, and was again summoned to attend, and attended, the next Court of the Wardens and Assistants of the said Company, which was held on 6th November, 1849, and on each of those occasions received his fees and acted as an Assistant, and was in all respects received and treated as an Assistant of the Company by the other members of the said Court of Assistants.

That the said Kay Dinsdale did not, except with regard to the representations hereafter referred to, ill-conduct himself as in the return alleged.

That the defendants did remove, expel and dispossess the said Kay Dinsdale from the said office, if he was in or holding the same, on 20th December, 1849, being after the making of the representations hereafter mentioned; and that they have kept him so removed and dispossessed from thence hitherto.

That on 23d April, 1799, the then Wardens and Assistants of the said Art or Mystery, at a meeting or *assembly duly held, [*52 convened, and constituted for that purpose, made and ordained,

so far as they lawfully could, what purported to be, and what they intended to be, a law and ordinance, the tenor whereof is as stated in the said return; which alleged law or ordinance was never since altered or varied in that behalf; and such law or ordinance (if ever a good one and in force) was, at the time in that behalf alleged in the said return, in full force.

That a person holding the said office, from which the said Kay Dinsdale was so removed as aforesaid, might, by reason of his being in such office, be elected to the office of Renter Warden, which last-mentioned office was, during all the times aforesaid and after mentioned, an office of trust, and the person for the time being holding the said last-mentioned office might, by virtue of such office, receive large sums of money belonging to the said Wardens, or Keepers, and Assistants, and which moneys had to be applied for charitable purposes and otherwise.

That the said Kay Dinsdale did, after the making and passing of the said resolution on 23d April, 1849, but before the same was communicated to him, or he was summoned or admitted to the said office as aforesaid, to wit, on 24th September, 1849, in answer to an inquiry which Giles Clarke, then being the agent in that behalf of the said Wardens, or Keepers, and Assistants, made of him as to his solvency, represent and state to the said Giles Clarke that he, Dinsdale, then was quite as solvent as any man of the said Court, and able to pay his creditors 20s. in the pound; whereas in truth the contrary then was and thence hitherto has been the fact, as he, Dinsdale, then well knew; and the said creditors never were paid their said debts, or any *53] part thereof, except a small dividend of 2s. 8d. in the pound, which and no more, after great delay, was paid to them under the bankruptcy in the said return referred to; and by means of the said false and fraudulent representations the said Kay Dinsdale induced and procured the said then Wardens, or Keepers, and Assistants, to admit him to the said office as aforesaid.

That the said Giles Clarke, as such clerk and agent as aforesaid, after the making of the said representations, so made as aforesaid, and in consequence thereof, caused the said Kay Dinsdale to be summoned as aforesaid to attend the said meeting, which it is alleged the said Kay Dinsdale attended as aforesaid, and caused the fact of the said election to be communicated to him the said Kay Dinsdale.

That the said representations were not communicated by the said Giles Clarke to any Court of the then Wardens and Assistants of the said Company, until 20th October, 1849, which was the first Court of the said Wardens and Assistants held after the said representations were so made as aforesaid.

That afterwards, on 30th November, 1849, the said Kay Dinsdale did become and was declared bankrupt, as in the said return alleged.

That the said Kay Dinsdale was not summoned to the said meeting or assembly of the said Court of Assistants in the said return alleged to have been held on 20th December, 1849, but the said meeting or assembly was in other respects duly convened, although he then resided in the same place where he had resided from the said 23d April, 1849, and where he resided when summoned to the previous Courts to which he had been summoned as aforesaid, and within a

reasonable and convenient *distance, namely, within three miles of Saddlers' Hall, where the said meeting and all other meetings [*54 of the said Wardens and Assistants were holden, and where the business of the said Company was transacted.

That all Assistants of the said Art or Mystery, duly elected and admitted in that behalf, were entitled to be summoned to the said meeting or assembly held on 20th December, 1849, and to attend the same.

That the said Kay Dinsdale had no notice of the said meeting or assembly until after the same had been held.

That he did not attend the same, and had no opportunity of attending the same.

[The verdict concluded in the old prolix form, giving the findings of the jury on the several facts, contingently upon the judgment of the Court.]

A translation of the Latin copy of the charter annexed to the special verdict accompanied the case. The following extracts from it are all that appear material:—

The charter commenced by incorporating the Company, by the name of "The Wardens, or Keepers, and Commonalty of the Mystery or Art of Saddlers in the City of London." It then provided "That from henceforth for ever, at all times hereafter, there may and shall be four of the freemen of the same Mystery, in the form in these our letters patent within specified, to be elected, appointed, constituted, and instituted, who shall be and be called Wardens or Keepers of the Mystery or Art of Saddlers of the City of London; and twenty of the freemen of the same Mystery, in the form in these presents within mentioned, to be nominated and constituted, who shall be and be called Assistants of the Mystery or Art aforesaid." It then named the persons who were to be the *first Wardens and Assistants, [*55 and who were "to continue in such offices during their natural lives, unless in the meanwhile they, or any of them, shall be removed for ill government, or ill conducting themselves in that behalf, or for any other reasonable cause." Powers for the election and removal of Wardens followed. It was then provided "That, as often and whenever it shall happen that any one or more of the Assistants of the Commonalty aforesaid shall at any time hereafter die, or retire, or be removed from his or their office (and we will that he or they shall, for ill government, or ill conduct, or for any other just and reasonable cause, be removable and removed by the Wardens, or Keepers, and Assistants of the Art or Mystery aforesaid for the time being, or the greater part of them then present, whereof we will that one of the Wardens, or Keepers, for the time being shall be one), that then and so often it may and shall be lawful to the Wardens, or Keepers, and the rest of the Assistants then living, or the greater part of them then present, whereof one of the Wardens, or Keepers, of the Art or Mystery aforesaid for the time being shall be one, at their pleasure, from time to time and at all times hereafter, to elect and nominate one other or more of the Commonalty of the Art or Mystery aforesaid for the time being, in the place or places of him or them so dead or removed as aforesaid; and that he or they, so elected or nominated to the office of Assistant of the Art or Mystery aforesaid, before they

or any of them shall be admitted to the execution of their office or offices ("antequam ad executionem officii sui vel officiorum suorum admittantur, seu eorum aliquis admittatur") shall take, and each of them shall take, a corporal oath upon the Holy Gospels of God for *56] the due execution of the office of Assistant of *the Art or Mystery aforesaid, before the Wardens or Keepers of the Commonalty aforesaid, or the greater part of them then present. To which said Wardens, or Keepers, and Assistants of the Art or Mystery aforesaid for the time being, or the greater part of them then present, We do for us, our heirs, and successors, by these presents, give and grant full power and authority to tender and administer such oath." The charter further required the Wardens, or Keepers, and Assistants, before admission to the execution of their respective offices to take the oaths of allegiance and supremacy, the oath prescribed by the Act (13 Car. 2, st. 2, c. 1) for the well government and regulation of Corporations, and the oath for the due execution of their offices respectively. No persons were to be eligible as Wardens, Keepers, or Assistants, who, respectively, before their election, should not hold communion with the Church of England, and should not, within six months at the least before such election, have received the Sacrament.

Then followed a proviso, "That every election of any Warden, or Keeper, Assistant, or Clerk, of the Company aforesaid, contrary to the directions and restrictions in these presents in that behalf mentioned, shall be void and of no effect to all intents and purposes whatsoever." It was then declared "That the Wardens or Keepers aforesaid, together with eight Assistants, at the least, of the Mystery aforesaid, for the time being, in any meeting met together and assembled, shall have, and by these presents may have, full authority and power to enact and make institutions, ordinances and constitutions ("plenam auctoritatem et facultatem condendi et faciendi institutiones, ordinationes, et constitutiones"), which to the same Wardens, or Keepers, *57] and the eight *Assistants aforesaid, at the least, shall seem good, salutary, useful, honourable ("honestas"), and necessary, according to their sound discretions, for the good rule and government of the Wardens, or Keepers, and Freemen and Commonalty of the Mystery aforesaid, and the officers and ministers of the same mystery for the time being; and for the declaring in what manner and order the aforesaid Wardens, or Keepers, and Freemen, and Commonalty, and other the men and every the ministers, officers, artificers, and freemen, and apprentices, and servants of such Mystery or Art, in their duties, services, workmanship, and businesses, touching and concerning the Mystery or Art aforesaid, and liberties of the same, shall conduct, behave, and exercise themselves; and otherwise for the further public good and common benefit and safe and quiet government of the Mystery or Art aforesaid." And power was given to such Wardens, or Keepers, and Assistants, to enforce the observance of the institutions, ordinances, and constitutions, so to be made, by imposing penalties and fines on disobedience; "so nevertheless, that such ordinances, institutions, and constitutions be not repugnant or contrary to the laws and statutes of our kingdom of England, or the provisos and limitations aforesaid, or contrary to the customs of the city of London,

or contrary to the liberties, jurisdictions, or privileges of the Mayor and Commonalty and citizens of the City aforesaid."

Gibbons, for the Crown.—A peremptory mandamus ought to be awarded for the restoration of the prosecutor to his office of Assistant of the defendant's Company. The special verdict substantially finds all the allegations in his pleas in "his favour. The charter, [*58 annexed to the verdict, agrees in effect with the statement of it in the writ. Then, it is found that the prosecutor was elected, and the election was confirmed, in due course. Thereupon, he became entitled to be admitted to the office; and, having been in fact admitted, cannot be ousted from it under the by-law of 28d April, 1799. Assuming that by-law to be good and valid, it does no more than prohibit the admission, to the office of Assistant, of a person who has become bankrupt or insolvent; it can have no operation to invalidate, *ex post facto*, the admission of such a person. [WIGHTMAN, J.—The defendants allege, in the return, that the prosecutor obtained the admission by false and fraudulent representations that he was solvent.] The admission was not vitiated, even if obtained by fraud; its validity being founded on the previous election, which gave the prosecutor title to admission. After electing him, it was too late for the defendants to say that he was disqualified for admission: *Rex v. Ward*, 2 Str. 893. If he was in other respects entitled to be admitted, the fact that he might be responsible, in some way, in respect of his misrepresentation, would not take away his right to admission: *Townshend's Case*, 1 Lev. 91. [WIGHTMAN, J.—If the by-law is to have any effect at all, it must prevent the admission of an insolvent to the office of an Assistant in the Company. BLACKBURN, J.—If your argument, that admission must follow on election as a matter of course, is well founded, the by-law is bad.] The prosecutor contends that the by-law is bad, for this reason, that it seeks to impose a disqualification [*59 *for the office in question not recognised by the common law. By the common law insolvency constitutes no disqualification for a corporate office, the holder of which has nothing to do with the receipt, or trust, or management, or fingering of the money of the corporation, nor can have anything to do with it, unless the rest of the Corporation should, by a corporate act of their own, trust him with it. The law was laid down to that effect by Lord Mansfield, C. J., in *Rex v. Mayor &c. of Liverpool*, 2 Burr. 728, 738. In the present case, although the Assistants of the Company are eligible to the further office of Renter Warden, which, unlike that of Assistant, involves the management of the Company's funds, an Assistant does not necessarily take the higher office, nor is the Company obliged to confer it on him. In *Rex v. Chitty*, 5 A. & E. 609 (E. C. L. R. vol. 81), it was held that an uncertificated bankrupt is not disqualified from being elected a counsellor for a borough and holding the office, under The Municipal Corporations Reform Act, unless he become bankrupt while holding it. That case was decided on the language of the statute in question, but shows that, apart from legislative prohibition, a bankrupt is equally eligible to office as a solvent person. So, in *Regina v. Owen*, 15 Q. B. 476 (E. C. L. R. vol. 69), it was held that pecuniary embarrassment and insolvent circumstances do not constitute "inability" to perform the office of clerk of a County Court, within the meaning of

stat. 9 & 10 Vict. c. 95, s. 24. Still less ought they to be considered as debarring the holder of a freehold office, which that of Assistant to the defendants' Company is, and that of a County Court Clerk is not, from retaining it.

*60] Again, the by-law is bad, because it ^{was} never sanctioned in the manner required by stat. 19 Hen. 7, c. 7, (a) which enacts "That no Masters, Wardens, and Fellowships of Crafts or Mysteries, nor any of them," "take upon them to make any acts or ordinances, ne to execute any acts or ordinances by them heretofore made" against the common profit of the people, but that the same acts or ordinances be examined and approved by the Chancellor, Treasurer of England, or Chief Justices of either Benches, or three of them. or before both the Justices of assize in their circuit or progress in that shire where such acts or ordinances be made, upon pain of forfeiture of xl. li. for every time that they do contrary." [COCKBURN, C. J.—I do not think that the by-law is such as that Act refers to. WIGHTMAN, J.—Supposing that the by-law is within the scope of that Act, it is not bad merely because not allowed as the Act directs.] Another ground on which the by-law is bad is that it is unreasonable in itself, as practically narrowing the number of members of the Company who are eligible to the office of Assistant, and eliminating therefrom all who have at any time been in insolvent circumstances. It is therefore bad, as attempting to alter the qualification of persons before eligible, beyond what the original constitution of the Company required: *Rex v. Tappenden*, 3 East 186. In *Rex v. Attwood*, 4 B. & Ad. 481 (E. C. L. R. vol. 24), though it was unnecessary to decide the point, the Court appears to have thought that a by-law narrowing the body of persons eligible to office in an incorporated mercantile Company, would be bad. That case was followed in *Regina v. Powell*, 3 E. & B. 377 (E. C. L. R. vol. 77). [COCKBURN, C. J.—Do you say that a

*61] ^{by-law} excluding from eligibility persons convicted of felony, and who had undergone their sentence, would be bad?] It is not necessary to go so far as that. In *Baggs' Case*, 11 Rep. 93 b, 99 a, the crimes are specified, upon attainder for which a citizen or free-man of a Corporation may be removed. But both that case and *Sir Thomas Earle's Case*, Carth. 173, 176, show that there can be no cause to disfranchise a member of a Corporation, unless it be for something done which works to the destruction of a body corporate, or of its liberties and privileges. The by-law is also bad, even if the exclusion of an insolvent from office is justifiable in itself, because it does not declare an insolvent ineligible, but merely prohibits his admission to office. Admission forms no part of the election, but stands to it in a relation analogous to that of the delivery of an executed deed to the execution. The prosecutor having been elected, the office is full, and no one can be elected in his place. The only remaining question which arises on the findings as to the issues joined on the first plea, is, whether the prosecutor's misrepresentation of the actual state of his circumstances constituted such fraud as to avoid his election. Now it is clear that although fraud may avoid a contract, it cannot divest an estate already vested. The misrepresentation, though made before the prosecutor was admitted, was made after he had been

(a) "For making of statutes by bodies incorporate."

elected; and therefore did not nullify the election. [BLACKBURN, J.—I doubt whether, in the present case, the prosecutor's election was complete before his admission. A mandamus would go, after election, to compel admission; and I am disposed to think that, before admission, a quo warranto would not lie. CROMPTON, J.—A quo *warranto might lie, before the admission of the person elected, [*62 if another person than he was admitted.] The prosecutor's election was in no way influenced by the misrepresentation, which, if it amounted to fraud, related to matters upon which Clarke had no right to question the prosecutor, and which he was under no legal obligation to Clarke to disclose with accuracy. It was not, therefore, such fraud as to invalidate the transaction; *Vernon v. Keys*, 12 East 632. Fraud on matters collateral to a contract does not absolutely avoid the contract; *White v. Garden*, 10 C. B. 919 (E. C. L. R. vol. 70), *Feret v. Hill*, 15 C. B. 207 (E. C. L. R. vol. 80). Lastly, the issue on the second plea is found entirely in favour of the prosecutor, and, upon that finding alone, he is entitled to a peremptory mandamus; he having been removed from his office at a meeting of which he had no notice, to which he was not summoned, and which he had no opportunity of attending in order to defend himself; *Baggs' Case*, 11 Rep. 93 b, *Rex v. Gaskin*, 8 T. R. 209.

Knowles, contra.—By the charter of the Company, the majority of the Wardens, or Keepers, and Assistants, present at the time, may remove an Assistant from his office for ill conduct, or for any other just and reasonable cause. And the charter contains a proviso, that every election of, amongst others, any Assistant, contrary to the directions or restrictions therein mentioned, shall be void and of no effect. It then, in very general terms, gives power to the Company to make by-laws. The by-law in dispute, of 23d April, 1799, does not go beyond that power. Being made at a time when there was no Insolvent Act in existence, it evidently was intended to *exclude [*63 from the office of Assistant any person who was or had been in insolvent circumstances, that is, according to *Parker v. Gossage*, 2 C. M. & R. 617, and *Biddlecombe v. Bond*, 4 A. & E. 332 (E. C. L. R. vol. 31), of general inability to pay his debts. The prosecutor's election was therefore void, by reason of the proviso in the charter; being contrary to the directions and restrictions contained in the by-law. A by-law is void if repugnant to the charter, *Tucker v. Rex*, 2 Bro. P. C. 304; but here the by-law is in strict accordance with the charter. The material question is, was the prosecutor duly qualified to be elected? It must be owned that the by-law in terms points to admission, only, as that for which insolvency is to disqualify; but, reading the by-law and the proviso in the charter together, the meaning must be that an insolvent person is not to be elected. Election gives but an inchoate right, which is perfected by admission. The next issue is, whether the prosecutor was duly elected, nominated and constituted an Assistant of the Company. Now, even assuming him to have been duly elected and nominated, he never was constituted an Assistant. "Constituted" must have some meaning, and must refer to the perfecting of election by admission. But inasmuch as the prosecutor obtained his admission by fraud, the admission was invalid and voidable by the defendants, who did in fact

avoid it as soon as they discovered the fraud. The fraud bears out the allegation in the return, that the prosecutor had ill-conducted himself. Then, was he duly in and entitled to hold his office? He could be so only by being duly sworn in and admitted, as enjoined by the charter. The title to every office is grounded on two things; the *64] election of the party, and *his being sworn into the office; *Rex v. Ellis*, 9 East 252, n. (a), and *Regina v. Humphery*, 10 A. & E. 835 (E. C. L. R. vol. 87). And though the prosecutor was, de facto, sworn in and admitted, the admission, having been obtained by fraud, must go for nothing. Next, assuming the prosecutor to have been duly in the office, the defendants had power to remove him from it for just and reasonable cause; and, if the Court can see that such cause existed, it will not be astute to defeat the removal on the ground of want of form in the mode of procedure. The question whether there was just and reasonable cause depends on whether or not the disputed by-law is a good one. The by-law is objected to by the other side on the ground that it is in contravention of the common law. But every by-law must, to some extent, abrogate what was before of common right. Moreover, the cases cited on the other side to show that insolvency does not disqualify from office, at common law, turned upon the particular facts in each, and by no means bear out such a general proposition. And the fact that, here, the election of the prosecutor as an Assistant put him in the way of being made Renter Warden, and, as such, intrusted with the money of the Company, disqualified him, as being an insolvent, from remaining an Assistant, according to the dicta of Lord Mansfield, C. J., in *Rex v. Mayor, &c., of Liverpool*, 2 Burr. 728, 733, which were referred to on the other side. [COCKBURN, C. J.—Although he might be ineligible on that ground, as Renter Warden, it does not follow that he could not be elected an Assistant.] Again, the rule that a by-law restricting the number of persons eligible to an office is bad, refers only to a restriction of the class eligible; the limitation, for instance, of an *65] *office, theretofore open to all members of a trade, to some only. Thus, the by-law which was held bad in *Rex v. Tappenden*, 8 East 186, was an attempt to narrow the class of persons who might be taken as apprentices by the freemen of a Company, by the custom of which every person who had served an apprenticeship of seven years to a freeman was entitled to the freedom. But it does not follow that a by-law imposing a qualification (for instance, the passing an examination, or the possessing certain acquirements, or the being approved of) on the whole of a class, is invalid. Such by-laws were upheld in *Rex v. The College of Physicians*, 7 T. R. 282; *Rex v. Master, &c., of the Company of Surgeons*, 2 Burr. 892; *Green v. Mayor of Durham*, 1 Burr. 127. The Case of the Tailors of Ipswich, 11 Rep. 58, shows the limits within which such by-laws may be made. The by-law in the present case is a reasonable regulation; for, in the majority of instances, insolvents and bankrupts are not fit persons to hold responsible offices; and ad ea quæ frequentius accidunt jura adaptantur. Lastly, the defendants having removed the prosecutor for a reasonable cause, the objection that the removal was informal, because he was not summoned to the meeting at which it took place, ought not to prevail. The defendants admit that the prosecutor ought,

in strictness, to have had notice of that meeting; but the question is, whether the Court, in the exercise of its discretion, will grant him a peremptory mandamus if of opinion that, though improperly removed from his office, he deserved amotion. Should the mandamus go, the prosecutor may, notwithstanding, be formally removed *de novo for the same cause. That consideration shows that the mandamus [66 ought not to be awarded; *Rex v. Tidderly*, Sid. 14; *Rex v. Mayor, &c., of Axbridge*, Cowp. 528; *Rex v. Griffiths*, 5 B. & Ald. 781 (E. C. L. R. vol. 7); *Tapping on Mandamus*, p. 401.

Gibbons, in reply.—Even supposing that the by-law is good, and that the prosecutor's fraud was so directly connected with his election as to give the defendants just and reasonable cause to remove him, they still cannot justify the manner in which he was removed: for they were not competent judges in their own cause, without giving him an opportunity of being heard. The material allegation in the writ is the removal; it was not for the defendants to judge of the prosecutor's title; *Rex v. Lyme Regis*, 1 Doug. 79. The prosecutor having been de facto elected to the office, and having accepted and acted in it, his title to it cannot be tried by a mandamus but only by quo warranto; *Frost v. The Mayor of Chester*, 5 E. & B. 581 (E. C. L. R. vol. 85). As was said by Raymond, C. J., in *Rex v. Hull*, 11 Mod. 390, "in cases of a mandamus where there appears the least right for the plaintiff, a peremptory mandamus must go." The prosecutor's misrepresentation of the true state of his circumstances, however, if a fraud on the defendants, was a fraud collateral to his election and admission, which it therefore did not affect; *Mason v. Ditchbourne*, 1 M. & R. 460; *Stewart v. Aston*, 8 Irish C. L. Rep. 85; *Feret v. Hill*, 15 Com. B. 207 (E. C. L. R. vol. 80). But the by-law is invalid. In *Rex v. The College of Physicians*, 7 T. R. 282, the by-laws held good were made in furtherance of the objects of the College. And in *Rex v. Master, &c., of the Company of Surgeons*, [67 2 Burr. 892, the person seeking to be bound an apprentice had no inchoate right to be so: whereas the present prosecutor had an inchoate right to admission as soon as he was elected. The by-law in *Green v. Mayor of Durham*, 1 Burr. 127, related merely to the mode of admission. Here, the by-law narrows the number of persons eligible as Assistants of the Company, and on that ground is bad. Lastly the Court has no discretion as to awarding a peremptory mandamus if the return is insufficient. All that the Court has now to try is the sufficiency of the return; *Regina v. Mayor of Norwich*, 2 Ld. Raym. 1244; *Buckley v. Palmer*, 2 Salk. 430; *Corner's Crown Practice*, p. 236. By stat. 9 Ann. c. 20 s. 2., "in case a verdict shall be found for the person" "suing" a writ of mandamus, "a peremptory writ of mandamus shall be granted without delay, for him" "for whom judgment shall be given."

COCKBURN, C. J.—I am of opinion that the prosecutor is entitled to a peremptory mandamus. It appears to me that the by-law, which is said to disqualify him from holding his office, is bad. It is not necessary to go the length of saying that where a corporate body, created by charter, imposes some qualification for office, common to all the members of the constituent body alike, in addition to the qualifications prescribed by the charter, the qualification so imposed is

necessarily bad, although it does not limit the area of eligibility and is a reasonable regulation under all the circumstances. Without *68] going that length, I think that the present by-law is bad on *two grounds. First, the qualification which it seeks to impose is not a reasonable one. It requires that every member of the body at large of the Company, out of which the assistants are to be chosen, shall, in order to be eligible as an Assistant, either never have been bankrupt or insolvent, or, if he ever has been so, shall have afterwards paid his creditors in full, or have established an honourable character for seven years subsequent to his bankruptcy or insolvency. Now I think that is an unreasonable test of qualification. Bankruptcy or insolvency may be perfectly innocent, the result of mere misfortune or misadventure in business; and a bankrupt may receive a first class certificate, preserve his character unimpaired, and satisfy his creditors, although he be unable to pay twenty shillings in the pound. It seems to me, therefore, to be unreasonable to lay down a rule that a man so circumstanced shall be necessarily ineligible as an Assistant of the Company, or eligible only after a seven years' probation. But there is a fault in the by-law which is, if possible, still more serious. Even assuming that the ground of disqualification which it imposes is reasonable, the by-law has the defect of making the qualification operate against admission merely, and not also against election. But the duty of admitting to office a person who has been elected to it is purely ministerial; the by-law, therefore, if it could have properly made insolvency a disqualification at all, should have made it a disqualification, not for admission, but for election. The electors have a right to elect any one who is not disqualified for election; and, when an eligible person has been once elected, the Court of the Company have no other duty left than to admit him to the office to which he *69] has been so elected. Then, as to *the second ground on which the grant of this mandamus has been resisted, namely, that the prosecutor was guilty of a corporate offence, for which he is liable to be removed from his office, in knowingly answering falsely the questions, as to his solvency, put to him with a view to his admission, it is unnecessary to decide whether this was such a corporate offence as would justify his amotion. It is admitted that he had no notice of his intended amotion on this ground. He therefore had not the opportunity, which the old established rule in such cases requires that he should have had, of being heard in explanation of the matters alleged against him. Without saying, therefore, whether or not there was a sufficient ground for his amotion, had he been heard and been unable to explain his conduct satisfactorily, his amotion was, under the circumstances, clearly bad. I am therefore of opinion upon both points, that the peremptory mandamus ought to issue.

WIGHTMAN, J.—This is an application for a mandamus to restore the applicant to an office from which he was removed while de facto in possession of it, on the ground of alleged misconduct by him in obtaining it by fraud and misrepresentation. Without determining whether or not the circumstances presented to us in this case show such fraud as would justify the amotion of a corporate officer, this much appears clear, that the applicant had no notice of the proceed-

ings that were to be taken against him, and therefore had no opportunity of explanation and defence. I agree with the Lord Chief Justice that upon that ground the peremptory mandamus ought to issue. But it is further said that the applicant never was in the office at all, being disqualified *from holding it by the by-law which has been [70 discussed. Now there are numerous authorities, which were cited during the argument, and to which I need not again refer, to show that if a person is, although disqualified, elected and actually admitted into an office, the only way of removing him is by quo warranto, and that the objection that he never ought to have been admitted cannot be taken in other proceedings. In the present case, the prosecutor is now actually in his office, inasmuch as he could not be lawfully amoved from it without being called on to make his defence. It appears to me, as I have said, that, for that reason alone, a peremptory mandamus ought to be awarded. But I further agree, also, with the Lord Chief Justice, that the by-law itself cannot be supported. It seems to me to be unreasonable. [His Lordship read the by-law.] It is open to the objection, mentioned by the Lord Chief Justice, that the disqualification which it imposes goes only to the admission, not to the election, of the officer. And it unreasonably prohibits the admission of a man who, though he has been bankrupt or insolvent, has satisfied all his creditors, unless he has paid them 20s. in the pound, although he may have behaved most honourably and conscientiously in paying them it may be 19s. or 19s. 6d. in the pound; and although those who elected him may have considered him a most honourable person. For all these reasons, I am of opinion that a peremptory mandamus ought to be awarded.

CROMPTON, J. (who had been absent during part of the argument).—I merely wish to say that, so far as I have heard the argument, I entertain a strong opinion in *favour of the Crown; but, as I had not the advantage of hearing Mr. Knowles, I take no part [71 in the decision.

BLACKBURN, J.—I entirely agree with the judgment of the rest of the Court. I think that the question of the validity of the by-law settles the other points in the case. For the reasons which have been already given, and which I will not repeat, I think that it was beyond the competency of the body corporate to impose the condition on the admission of the prosecutor to office which is imposed by the by-law. I also agree that the prosecutor, once elected and admitted to office, could not be amoved without notice of the proceedings, even for an offence which would justify his amotion. As to the objection urged by Mr. Knowles, that, supposing the prosecutor to be restored, the defendants might, upon what appears on the special verdict, proceed to remove him in a formal manner, and that we, therefore, ought, in the exercise of our discretion, to refuse to award a peremptory mandamus, I think that we are bound, now that by a recent statute(a) error can be brought on our judgment, to give a judgment on which error will lie, and to decide whether the prosecutor is or is not entitled to a peremptory mandamus. And in my opinion he is so entitled, on the facts before us, whether or not he has been guilty of an offence

(a) Stat. 6 & 7 Vict. c. 67, s. 2.

which will justify his amotion hereafter; a point on which I express no opinion.

Judgment for the Crown, that a peremptory mandamus do issue.

***72] *IN THE EXCHEQUER CHAMBER.**

(Error from the Court of Queen's Bench.)

The QUEEN, on the prosecution of KAY DINSDALE, Respondent, v. the Wardens or Keepers and Assistants of the Mystery or Art of SADDLERS of the City LONDON, Appellants. Jan. 12.

For syllabus, see ante, p. 43.

FROM the above decision the defendants appealed. The case was argued in last Michaelmas Vacation.^(a)

Knowles (*Rochfort Clarke* with him) argued for the appellants; *Gibbons* for the Crown. *Rochfort Clarke*, by leave of the Court, replied.

The arguments were substantially the same as in the Court below.

MARTIN, B., now delivered the judgment of the Court.

This was a mandamus directed to the Wardens and Assistants of The Saddlers' Company, commanding them to restore the prosecutor, Kay Dinsdale, to the place of an Assistant upon the Court of the Company. The writ recited the charter of King Charles II., incorporating the Company, which gave, inter alia, power to appoint *73] *future Wardens and Assistants, by election and admittance, both of which proceedings are expressly mentioned in the charter; a power to remove Assistants for ill-government or ill-conducting him or themselves, or for any other just or reasonable cause; and a power to make such by-laws as should seem "good, useful, honest, and necessary, according to their sound discretions, for the good rule and government of the Wardens, or Keepers, and freemen and commonalty of the Mystery or Art, and officers and ministers of the same Mystery for the time being," and to declare "in what way or order the aforesaid Wardens or Keepers, freemen and commonalty, and other men of the said Mystery or Art, should use and conduct themselves in the office, ministry, artifice, and business of the said Mystery or Art, and otherwise for the public good and general utility, and safe and quiet government of the said Mystery or Art;" which by-laws were to be observed so as they should not be repugnant nor contrary to the laws and statutes of the Kingdom of England, nor the provisions of the charter, nor to the custom of the City of London, nor the liberties, jurisdictions, or privileges of the Mayor and Commonalty and citizens of the said city. The writ further recited that the prosecutor was duly qualified to be and, on 20th October, 1849, was duly elected and admitted as an Assistant, and was afterwards by the defendants wrongfully removed.

The return, in substance, alleged that the charter was not fully or correctly set forth in the writ, and that it contained a provision that

(a) Tuesday, November 27th, and Wednesday, November 28th; before Willes and Keating, J., Martin, Channell and Wilde, Bs.

elections of Assistants contrary to the directions of the charter should be void. That the prosecutor was not duly qualified; was not duly elected, nominated, or constituted, an Assistant; *that he had [*74 ill-conducted himself, and was not entitled to hold his office; that there was just cause for his removal; that he was not wrongfully removed or without just cause; that the Company has considerable property, real and personal, and the care and distribution of various charity and other estates; that the Wardens are elected annually by ballot from the Court of Assistants, and that, according to the usual course and routine, a person coming upon the Court would be elected to the offices, first, of Benter Warden, an officer who is treasurer of the Company and has the receipt of the rents and the charge and custody of those and other moneys and property of the Company, and performs the duties of the office in person; next, that of Quarter Warden, an officer who receives the quarterage, which he pays over to the Benter Warden; afterwards, that of Key Warden, who has the care of the common seal and archives; and, finally, that of Prime Warden and Master, who presides at meetings of the Court and has a casting vote; after which the member falls back into the Court. That the Assistants manage the affairs of the Company, and control the expenditure, and the grant of pensions and relief to decayed members, and have the general government of the Company and the trade; possessing and exercising, inter alia, a right of search for and seizure of deceitful wares. That the election of Assistants, in case of vacancy, is made from the Livery according to seniority. In cases of solvency and good character, the office is held for life; but, in case of misconduct causing unfitness, or other sufficient cause, or receiving parochial aid, or petitioning the Court for relief, the Assistant would no longer receive a summons to attend the Court. That, should an Assistant come to decay, and petition for relief *out of the Company's [*75 funds, he is considered, as a matter of course, to cease to be a member of the Court, upon receipt of his first quarter's pension, and the vacancy so caused is at once filled up, and the decayed member falls back into the livery; and that the same course has been pursued in the case of misconduct involving unfitness or incompetency. That, on 23d April, 1799, a by-law was made, in pursuance of the power in the charter, which by-law has since remained in force, and is in these words:—"Resolved, that no person who has been a bankrupt or become otherwise insolvent, shall hereafter be admitted a member of the Court of Assistants of this Company, unless it be proved to the satisfaction of the Court that such person, after his bankruptcy or insolvency, has paid and satisfied his creditors the whole of their debts, or shall have established a fair and honourable character for seven years subsequent to such his bankruptcy or insolvency, to the satisfaction of the Court, or the majority of them." That the prosecutor procured his election and admittance by fraudulent representation himself to be solvent, whereas he was in fact insolvent, and his creditors have never received payment, except of a dividend of 2s. 8d. in the pound, under his bankruptcy. That he afterwards, on 30th November, 1849, was adjudicated bankrupt in respect of a debt existing at the time of his false representation of solvency; which bankruptcy remains in force; and that he was, at a subsequent meeting of

the Court, duly convened and held before the issuing of the mandamus, lawfully removed, and that for these reasons he ought not to be restored.

The prosecutor pleaded to this return two pleas. The first traversed the statement in the return, as to the letters *patent being insufficiently set forth. It also alleged, in effect, that the prosecutor was duly qualified; duly elected; had not misconducted himself; was duly in and entitled to the office; that there was no just cause for his removal; that the removal was wrongful and without just cause; that no such by-law was made or in force at the times when, &c.; that the prosecutor did not make the false and fraudulent statement alleged; that he was duly elected and admitted, and not through any fraud; that the meeting of the Court at which he was removed was not duly convened; and that he was not removed and did not cease to be, but at the time of teste of the writ was, and still is, an Assistant, and entitled to be admitted thereto. The second plea alleged, that the prosecutor was, at the time of the holding of the Court at which he was removed, an Assistant, and entitled to be summoned, but that he was not summoned thereto, and had not notice nor any opportunity of attending thereat.

Upon these pleas the defendants took issue.

It may have been observed that the return, in so far as it states the manner and routine in which the Wardens are elected, their duties with respect to the moneys of the Company, and the insolvency and bankruptcy of the prosecutor, is not traversed, and that those statements, if material, are admitted for the purposes of the cause.

At the trial a special verdict was found, the material points of which may be stated as follows. It finds the charter, a copy of which in the Latin is annexed, and also the by-law in the terms stated in the return. It states that a person holding the office of Assistant "might, by reason of his being in such office, be elected to the office of Renter Warden, which last mentioned office was an office of trust, and the *77] person for the time *being holding the said last mentioned office might, by virtue of such office, receive large sums of money belonging to the said Wardens, or Keepers, and Assistants, and which moneys had to be applied for charitable purposes and otherwise." It further appears, from the verdict, that the prosecutor was, on the 23d April, 1849, in due form elected an Assistant by a preliminary resolution, which was in due form confirmed on 25th July following. That, on 24th September, he made a representation to the clerk and agent of the Company that he was solvent: that, in consequence of such statement, he was, on the 16th of October, informed of his election, and summoned to attend a Court on the 20th of the same month, which he did accordingly, and was then sworn in and acted and received his fee as an Assistant; and that he was again summoned to attend, and attended, a Court on 6th November, when he also received his fee and acted as an Assistant. That, on the 30th of the same month, he was adjudicated bankrupt. That, on the 20th December, at a meeting of Assistants held without any summons or notice to the prosecutor, or opportunity of his attending, but in other respects regular, he was expelled. As to the qualification of the prosecutor for the office, the verdict finds that, at the time of the first resolution for his election,

and from thence virtually up to and at the time of his illegal removal, he was in insolvent circumstances and unable to pay his creditors 20s. in the pound, and, during all such time, the said Kay Dinsdale then owed large sums of money, on judgments and otherwise, to divers persons, which debts have always remained unpaid and unsatisfied; but he was, in other respects, duly qualified to be elected an Assistant. As to the alleged *fraud, the verdict finds that the prosecutor [*78 did, after the passing of the resolution of 23d April, but before it was communicated to him, to wit on 24th September, 1849, in answer to an inquiry which Giles Clarke, then being the agent in that behalf of the defendants, made of him as to his solvency, represent and state to the said Giles Clarke, then being the clerk and agent as aforesaid of the defendants, that he was then quite as solvent as any man of the Court, and able to pay his creditors 20s. in the pound, whereas, in truth, he then was, and thence hitherto has been, insolvent, and he was then largely indebted to divers persons in large sums of money, and was wholly unable to pay his creditors 20s. in the pound, as he then well knew, and the said creditors never were paid their said debts, or any part thereof, except a small dividend of 2s. 8d. in the pound, which, and no more, after great delay, was paid to the said creditors under the bankruptcy mentioned in the return; and that, "by means of the said false and fraudulent representations, the said Kay Dinsdale induced and procured the said then Wardens, or Keepers, and Assistants, to admit him to the said office aforesaid." That the said Giles Clarke, as such clerk and agent as aforesaid, after the making of the said representations, and in consequence thereof, caused the prosecutor to be summoned to attend the meetings which it is alleged he attended, and caused the fact of the election to be communicated to him. That the said representations were not communicated by the said Giles Clarke to the Court of the Company until 20th October, 1849, which was the first Court held after they were made, and was the Court at which the prosecutor was admitted.

Upon this special verdict the Court of Queen's Bench *gave [*79 judgment for the prosecutor, and awarded a peremptory mandamus. The case was thereupon, by the proceeding substituted for a writ of error, brought into this Court, and it was argued before us at the Sittings after last Term, when we took time to consider.

The first and great question is as to the validity of the by-law. The objections made to it were, first, that it was beyond the powers of the Court of Assistants; secondly, that it was void, because of the provisions of stat. 19 H. 7, c. 7; and lastly, that, if not, it was bad in form, as being directed against admittance only and not election.

The first objection, if valid, must be so either because of the bankruptcy or insolvency of a freeman being in itself an unreasonable ground of disqualification for the office of Assistant, or because of a violation of the charter in unduly limiting the class from whom the selection of Assistants is to be made. Upon full consideration, however, we are of opinion that the bankruptcy or insolvency does not constitute an unreasonable ground of disqualification for the office of Assistant. Not only is the office in itself one of trust and confidence, but it leads, almost as a matter of course, to the office of Renter Warden, the holder of which is the treasurer and keeps the purse;

and it seems to us but reasonable that persons interested in the prosperity and honour of the Company should desire that the custody of its money should be not only trustworthy, but safe beyond the risk of temptation, and that the conduct of its affairs should not be in the hands of those who have shown themselves to be presumably incompetent to the prudent management of their own. It is true that persons do sometimes become bankrupt and *insolvent without *80] misconduct, and even without imprudence, but the great mass of bankruptcy and insolvency is to be traced to one or other of these causes; and by-laws must be considered as subject to the general maxim that laws ought to be adapted to meet cases of ordinary occurrence, and ought not to be pronounced bad because, in rare and exceptional instances, they may work a hardship.

With respect to the authorities cited on this point, they do not, in our opinion, touch it. That of *Rex v. The Mayor, &c., of Liverpool*, 2 Burr. 728, arose upon the common law, and not upon a by-law, which must necessarily superadd something to the common law, otherwise it would be idle. Indeed, bankruptcy was unknown to the common law, and is the creation of comparatively modern statutes. The other cases turned upon the construction of particular statutes relating, one of them to municipal corporations and the other to County Courts, and they have equally little application.

Next, as to the question whether the by-law unduly restricts the eligible class, in violation of the provisions of the charter; we must observe that there is a distinction in this respect between by-laws which exclude a class of persons from an office to which by the charter they are eligible, and those which only ascertain a criterion of fitness such as, having regard to the object of the charter, is a just and reasonable one. The former class is void, the latter valid; and it is within this class that the by-law in question, in our opinion, falls. The law is, in this respect, correctly stated in Mr. Frazer's learned note to *81] *The Case of Corporations*, 4 Rep. 78 a. See also *Green v. Mayor of Durham*, 1 Burr. 127, s. c. *Ld. Ken.* 512. The second objection, founded upon stat. 19 H. 7, c. 7, is disposed of by reference to the decisions upon the construction of that statute, stated in 2 Kydd 108, from which it appears that, although a penalty may be incurred by the persons who make a by-law without the approval therein directed to be obtained, yet the by-law itself, made without such approval, is not invalid.

We proceed to consider whether the last objection, pointed to the form of the by-law, is fatal. That objection is, that the by-law professes to invalidate the admittance only, and therefore impliedly permits the election, by which it is alleged that the right to admittance is vested, and after which it is said that the admittance is merely ministerial. The whole weight of this argument rests upon the assumption that the by-law uses the words "be admitted a member of the Court of Assistants" in the same restricted sense in which the phrase "*ad executionem officii sui admittatur*" is employed in the charter, as pointing to an admittance after an election. Now assuming, for argument's sake, that the by-law, if so read, would be inoperative, as to which we give no opinion, still, the question whether it is to be so read depends upon whether any other reasonable construction can be put upon its language, so as to make it

operative; and, if so, whether the Court ought to construe a by-law like a plea in estoppel, or whether we ought not to put upon it such a construction as, if possible, to make it effectual. Now the by-law is, certainly, capable of a different construction from that put upon it by the prosecutor's counsel; for, according *to the ordinary use of language, a law that a person shall not "be admitted a member" means that he shall be excluded from becoming so by any of the means conducive thereto; whether by election, admittance after election, or otherwise. Indeed, when it is considered that, in this case, the functions of election and admittance are performed by the same body, it seems unreasonable to draw a distinction between a rejection thereby at the election, and a refusal thereby of admittance after election; both processes taken together constituting in fact the person's being admitted a member. It is sufficient, however, to say that the construction above suggested is one of which the by-law is capable, and which it ought to receive, according to the familiar rule of construction that instruments should be so construed as that they may stand good, rather than be defeated. That this rule is applicable to by-laws sufficiently appears from the case of *The Poulterers' Company v. Phillips*, 6 Bing. N. C. 814 (E. C. L. R. vol. 37). The by-law, read in the sense thus explained, and enforced, rendered invalid both the election and admittance of the prosecutor, by reason of his insolvency; and, if this were a proceeding against him by quo warranto, we must have given judgment for the Crown, by reason of such his disqualification. It was, however, agreed that the question raised by the present proceedings was different from that which would have arisen upon a quo warranto, because the prosecutor had actually been admitted and had seisin of the office before his removal; and that, inasmuch as the removal took place without his having an opportunity of being heard in his own defence, it was inoperative, and, so, that he is entitled to be restored; *and can only be removed, if at all, either by quo warranto, or by a regularly constituted meeting of the Court of Assistants, at which he may have an opportunity of being heard. We assent to this argument in so far as it asserts that the proceedings at the meeting of 20th December were inoperative to remove the prosecutor as for a corporate offence, adjudicated upon by dismissal, pursuant to the charter. We also think that the learned counsel for the prosecutor was well founded in his contention that a corporate offence not constituting a disqualification de facto, committed, after election, by a person otherwise well qualified, could not be relied upon in the return to a mandamus to restore, without showing an expulsion, in consequence of such offence, after the prosecutor had had an opportunity of being heard. This is obviously reasonable, because the person accused might, if heard, put forward an excuse which the Court of Assistants, proceeding to consider the question, it may be less rigorously than would a strictly judicial tribunal, might in their judgment deem sufficient; or he might prove such circumstances as would induce them to overlook the offence and abstain from removing him. Such a course of reasoning is, however, inapplicable to a case like the present, in which the prosecutor appears to have been, from the beginning, disqualified by a by-law, forming as much part of the constitution of the Company

as does its charter, and where the Court of Assistants could not, consistently with their duty, waive that disqualification, or do otherwise than expel him. The distinction between such a case and that first put is obvious. It is also plainly distinguishable from that which *84] arises where, upon a mandamus to elect, the Corporation *re- turns that the office is already full, so as to put it upon the applicant to try the question in a proceeding against the person really interested. We should be very slow to allow the prerogative writ of mandamus to issue, ordering the restoration to office of a person not qualified to hold it, or to discharge its duties; who ought never to have been elected, and who never would have been elected but for a mistake of fact on the part of the electors. It might well be held, and not inconsistently with any authority cited, that the maxim "error facti non nocet" governs the case, and decides it in favour of the defendants. It is, however, unnecessary to dispose of the case on this ground, because the only circumstance which could be plausibly relied upon as making a proceeding by quo warranto necessary, was the admittance de facto; it being clear that the insufficiency of the election would be a good answer to a mandamus to admit, even if it be not so to a mandamus to restore: see *Rex v. Williams*, 8 B. & C. 681 (E. C. L. R. vol. 15). And in our opinion the argument for the defendants was successful to show that any effect of the admittance in this case was defeated by the falsehood whereby it was obtained. To this argument several answers were put forward on the part of the prosecution. First, it was said that the misrepresentation was a mere falsehood as to something collateral or immaterial. This depends upon whether the by-law was valid, and it is disposed of by our decision in the affirmative. In each of the cases referred to under this head, except *Stewart v. Aston*, 8 Irish C. L. Rep. 35, the Court held that the misrepresentation was not of a fact "*dantis causam contractui*" but of collateral matter. In the *85] case of *Stewart v. Aston*, the *marginal note of which is incorrect, a consideration had actually passed, and was retained by the defendant, so that he was not in a position to avoid the deed upon the ground of fraud: see *Clarke v. Dixon*, E. B. & E. 148 (E. C. L. R. vol. 96). In the present case, as the by-law was valid, the statement of solvency was relevant and material to the question of admittance, and was the direct cause and occasion thereof. Next, it was said that the finding in the special verdict that the admittance was procured by means of a representation which the verdict designates as "false and fraudulent," ought not to be acted upon, because at the time of making it the prosecutor did not know of his election. To this, however, the answer is plain, that he knew he might be elected, and made the statement, knowing it to be false, to the agent of the electoral body; and that when that statement was reported to them at the Court of 20th December, where he was admitted, he accepted and acted upon the admittance, which, as he must then have known, proceeded upon the faith of his statement being true. These circumstances, simply, warrant the conclusion that he procured his admittance by falsehood and fraud. Lastly, it was argued that, even assuming the admittance to have been procured by fraud of the prosecutor, yet the office became vested in him, and could not be divested by reason of the fraud.

For this proposition were cited the cases of *Feret v. Hill*, 15 C. B. 207 (E. C. L. R. vol. 80), where the misrepresentation was held to be collateral and not to go to the root of the contract, and *Stewart v. Aston*, where, as already pointed out, it was impossible to place the parties in statu quo. In neither of *those cases was it decided [*86 that fraud may not invalidate a transfer of land equally as one of goods, where the parties can be put in statu quo by simply avoiding the transaction, and the election to avoid it is made by the party defrauded within a reasonable time after the discovery of the fraud, and before a right has been created in any third party. And, in whatever manner the question thus stated ought to be decided, there is a wide difference between a conveyance of land which by the policy of the law must be vested in some one, and the creation of a personal right incapable of transfer, such as the office of Assistant. A much closer analogy is found in the case of judgments and other proceedings in Courts of justice, obtained by fraud upon the Court. These might be treated as void in a collateral proceeding without any writ of deceit, where that process existed, and without any application to the Court to set them aside. Instances of this will be found, as to a fine, in *Fermor's Case*, 3 Rep. 77 a; as to a judgment, in *Philipson v. Lord Egremont*, 6 Q. B. 587 (E. C. L. R. vol. 51); and as to a decree, in *Earl of Bandon v. Becher*, 3 Cl. & F. 479.

We are therefore of opinion that the objection as to the effect of the admittance is not open to the prosecutor; and in so deciding we act upon the plain principle that "it is not reasonable that one should take advantage of his own wrong, and if the law should give him such power the law would be the cause and occasion of wrong," 5 Rep. 30 b.

We have thus disposed of all the questions affecting the merits of the case; and it only remains for us to *direct how the verdict [*87 should be entered upon the issues in point of form.

It is right here to notice that the special verdict is drawn in the old form, with much unnecessary prolixity, instead of in a simple and more compendious form, after finding the facts, stating that the jury are ignorant how, upon such facts, the issues ought to be found; praying the advice of the Court; and stating that they find according to its judgment: or, if it be desired to narrow the question for the opinion of the Court, the form adopted in *Mowatt v. Lord Londesborough*, 4 E. & B. 1 (E. C. L. R. vol. 82), may be resorted to. We impute no blame to the gentlemen who prepared the special verdict in the present form, for which there are no doubt numerous precedents; but we trust that in future a shorter form will be adopted in practice. As to the first plea, the substantial part of it must, according to our judgment, be found for the defendants. The traverse as to the charter being insufficiently set out in the mandamus ought to be treated as a distinct issue in denial of the charter alleged, and found for the prosecutor. So ought the traverse as to the prosecutor having been duly elected, because, upon these pleadings, the issue as to the election is simply whether it was done in point of form; the due qualification of the prosecutor being the subject of distinct averment in the mandamus, return and plea. We must for this purpose treat the issue as divisible, for the second Common Law Procedure Act puts the pleadings in mandamus, after the return, upon the same foot-

ing as those in an ordinary action. As to the residue of the first plea, the judgment of Lord Wensleydale in *Lush v. Russell*, 5 Exch. 203, *88] is conclusive to show that, in our view of the substantial question, the finding must be for the defendants.

As to the second plea, it is either sustainable, in point of law, on the ground that the averment, that the prosecutor was an Assistant, and entitled to attend the meeting of 20th December, is an implied traverse of that part of the return which we have held to be an answer to the mandamus; and, as that averment is disproved, the plea fails; or, if that averment is not to be so construed, the plea is insufficient in point of law, and then, in order to entitle the prosecutor to a verdict thereupon, it was necessary to prove all the averments. In either view, the verdict upon that issue must be for the defendants.

The result is, that we reverse the judgment of the Queen's Bench and give judgment for the defendants. Judgment reversed.

The judgment of the Court of Queen's Bench was affirmed, and that of the Exchequer Chamber was reversed, in the House of Lords, on 28th July, 1863.

The power of a club to expel one of its members came into question and was elaborately discussed in *Evans v. The Philadelphia Club*. The view taken by the court was that the offence committed by the member sought to be expelled did not constitute a corporate offence, but was a "minor offence" directed, not against the society, but against a fellow-member, which did not justify disfranchisement. The charge preferred against the plaintiff was that he made an assault upon a fellow-member of the club within the walls of the building. Woodward, C. J., said: "Now, undoubtedly, such conduct was disorderly; for though the objects and purposes of the society are not set forth in the charter, it is said to be a club for the cultivation of social relations, and these are friendly and kind relations, and are not promoted by such conduct as is imputed to the relator. But does a single instance of disorderly conduct justify disfranchisement? It is not alleged that the relator is a quarrelsome person, or habitually disorderly. On the contrary, it was admitted in argument that he is a respectable gentleman, and it is shown that when the offence occurred he was sit-

ting in the bar-room of the club-house in quiet and friendly conversation with another person, when Thomas entered and uttered defamatory words, which the relator understood to be applied to himself. It was, therefore, an assault upon Thomas provoked by himself. It was not an interruption of any deliberations or proceedings of the club in a state of organization—it occurred not in a reading-room, or an eating-room, not at a card or billiard table, but in what is called the office or bar-room of the house. * * * I would be very sorry to say that anything short of a statute could confer on a majority of members of any corporation power to expel a member for merely disorderly conduct. Talking or whispering in a reading-room, or wandering from the question in debate, or interrupting another when he is speaking, and very many mere breaches of good manners are disorderly and injurious to such a club and fit to be visited by reprimands and fines, but are not such offences against corporate duty as forfeit the franchise:" *Evans v. Philadelphia Club*, 14 Wright (Pa. 1865) 107.

But in *Hopkinson v. The Marquis of*

Exeter, the plaintiff, a member of the Conservative Club of London, replied to the committee, which assumed to interfere with his right of voting, as he saw fit, for members of Parliament, in language offensive in character, charging the committee with using a falsehood for electoral intimidation, and demanding a public acknowledgment of the falsity of the report, and a public apology to himself. For this he was, in prescribed form, expelled, and the Master of the Rolls, Lord Romilly, refused to review the discretion exercised by the club. He said: "The principal object, I apprehend, of all these clubs is, that they meet for social purposes, and the others are secondary to it. For that purpose it is obviously essential that all the members of the club should be upon a good footing and understanding with each other; and that nothing should occur that is in the slightest degree likely to interfere with the mere social arrangements of the club. * * * I agree

that the discretion in such cases must not be a capricious discretion; it must not be a merely arbitrary discretion; but it must be founded upon grounds which are in their character judicial. That being so, I am of opinion that that there is no appeal from it; and that the court cannot say that we should have decided differently from what you have decided; but if you have decided it *bonâ fide*, without any caprice, without any undue motive, then the case is a judicial decision by the club, from which there remains no other appeal to any other person:" 37 L. J. Ch. 173.

In the American case, it will be observed, the club was incorporated, while in the English case it formed merely a partnership. The property, however, owned by the club, upon which considerable stress was laid by C. J. Woodward, must have been much greater in the case of the Conservative, than of the Philadelphia Club.

***89] The Overseers of the Poor of the Parish of ST. BOTOLPH
WITHOUT ALDGATE, Appellants, v. The Board of Works
for the WHITECHAPEL District, Respondents. June 6, 9.**

By the Metropolis Management Act, 1855, 18 & 19 Vict. c. 120, s. 158, every Metropolitan District Board is, by order under its seal, to require the overseers of the several parishes in the district to levy and pay over to the Board the sums which it requires for defraying the expenses of the execution of the Act; distinguishing, in such order, the sums required for sewerage expenses from those required for other expenses under the Act. By sect. 159, if it appears to the Board that all or part of the expenses for defraying which the order is made have been incurred for the special benefit of part, or not for the equal benefit of the whole, of the district, the order may direct the sums, or part of them, required to be levied, to be levied in the part of the district specially benefited, or may exempt any part of the district from the levy, or require a less rate to be levied thereon, as the circumstances may require; and if in the judgment of the Board an entire parish is entitled to exemption, no order need be made on such parish.

Held, that the effect of the Act is to substitute districts for the parishes of which they are composed, for all purposes of management, taxation, and expenditure; not for purposes of management only. That the rates leviable in the component parishes under the orders of a District Board, are raised for the benefit of the whole district, though apportioned between the parishes. That, *prima facie*, the rates ought to be apportioned between the parishes according to their respective rateable value, and not according to the outlay in them respectively; subject to allowances, at the discretion of the Board, in cases falling within sect. 159. That an order of a District Board on a parish, distinguishing between the sums required for sewerage and for other expenses, is good under sect. 158, and is final, if made by the Board after an impartial exercise of the discretion given to it by sect. 159; the decision of the Board, so arrived at, as to the amount proper to be required from a parish, being, even if erroneous, conclusive.

CASE stated by a Metropolitan Police Magistrate, under stat. 20 & 21 Vict. c. 43.

On 17th February, 1858, the said overseers, the appellants, were summoned to appear on 24th February, 1858, before the magistrate, at the Police Court, Arbour Square, in the county of Middlesex, and within the Metropolitan Police District: For that the Board of Works for the Whitechapel district, by an order under their seal, bearing date 2d March, 1857, directed to Henry Grant Baker and Charles Mc-
*90] Lachlan, did require them, as the *overseers of the parish of St. Botolph without Aldgate, in the county of Middlesex, to levy and pay over to the treasurer of the said Board the sum of 564*l.* 1*s.*, upon the days and by the instalments therein mentioned. And for that default had been made in payment of the said several sums in manner directed by such order.

The said complaint was made under the provisions of stat. 18 & 19 Vict. c. 120. [The case then set out a copy of the order of 2d March, 1857; which contained a notice that the sum of 141*l.* 0*s.* 3*d.*, part of the said sum of 564*l.* 1*s.*, was required for defraying expenses of constructing, altering, maintaining, and cleansing the sewers, or otherwise connected with sewerage within the said district; and that the sum of 423*l.* 0*s.* 9*d.*, the remaining part of the said sum of 564*l.* 1*s.*, was required for defraying other expenses of the execution of the said Act within the said district. The order also contained the following note. "The overseers, having levied the amount of the above order in the manner directed by the 161st section of stat. 18 & 19 Vict. c. 120, are required by the same section to pay to the treasurer of the Board, or otherwise as in such order directed, the amount mentioned in the order, within the time or respective times specified for that pur-

pose, and the excess, if any, which may have been levied beyond such amount; which excess shall be placed to the credit of the parish or part in which the same has been levied." It was proved before the magistrate that the said order had been made in conformity with certain resolutions passed by the said Board of Works on 4th August, 1856, 23d February, 1857, and 2d March, 1857. Considerable discussion had, from time to time, taken place, at the said Board of Works, as to the principle to be adopted in *determining the contribu- [*91
tions to be paid by the various parishes and places within the district. At a meeting of the Board on 4th August, 1856, it was resolved, "That the expense of keeping the pavement in repair, and every other expense, ought to be charged in the same manner on each parish, in proportion to its rateable value; but that, as some portions of the district were not paved at all, and other portions were very insufficiently paved, the expense of bringing the paving of those portions of the district into as good a condition as the well-paved portions of the district ought to be borne by the parishes in which those unpaved or insufficiently-paved portions were situate." At a meeting of the Board on 23d February, 1857, it was resolved, "That the recommendation of the Finance Committee, as to a call to be made upon the several parishes and places within the district, be approved and adopted." The call upon Whitechapel was for the sum of 2225*l.* for a general rate, and for the sum of 456*l.* 11*s.* 9*d.* for a sewers' rate. At a meeting of the Board on 2d March, 1857, the clerk laid before the Board the several contribution orders directed to the overseers of the several parishes within the district, which had been prepared by him for the several amounts determined upon at the last meeting of the Board, and which, upon reference to the minutes of the last-mentioned meeting, were found to be correct. It was then resolved, "That the common seal of the Board be affixed to such several contribution orders, and that Messrs. Soper and Freeman be the members of the Board, in addition to the Chairman, to attest the affixing of the seal of the Board thereto." The common seal of the Board was then affixed to such several orders, and the affixing of the seal was attested by the *Chairman, by Messrs. Soper and Freeman, and by the [*92
clerk. The above sum of 2225*l.*, charged to the parish of Whitechapel under the general rate, is composed of its share of the call, according to rateable value, and of a sum of 855*l.* 4*s.* 9*d.*, being a sum required for special paving, chargeable exclusively on Whitechapel, according to the aforesaid resolution of 4th August, 1856. The other sums mentioned in the recommendation of the Finance Committee, with the exception of 285*l.* for bond debt and interest charged exclusively upon the parish of The Holy Trinity, Minorities, represent the shares of the call, according to rateable value, payable by each parish in the district. Prior to and at the time of passing of The Metropolis Management Act, 1855, the said parish of St. Botolph without Aldgate had been and was separately rated for drainage, paving, cleansing, lighting, and other purposes named in the said Act for the better local management of the Metropolis, except sewerage; and the affairs of the said parish in respect of those matters were managed under and by virtue of the provisions of a local Act of Par-

liament, 47 G. 3, c. xxxviii., (a) intituled "An Act for more effectually paving the streets, and other places, within that part of the parish of St. Botolph Aldgate, which lies in the county of Middlesex, and part of a street called East Smithfield, in the precinct of St. Catherine, and for cleansing, lighting, and watching the same, and for preventing annoyances therein." (This Act was to be taken as part of the case.) If each parish in the Whitechapel district had been required to contribute to the sewers' rate and the general rate for the district, upon *93] the principle of apportioning the whole amount of those *rates among the several parishes in the district, according to the outlay for those purposes respectively, or according to the benefit directly derived by such parishes respectively therefrom, and not, as was done, upon the principle of requiring each parish to contribute according to its rateable value only, then the sum to be contributed by the parish of St. Botolph without Aldgate, both as regards the sewers' rate and the general rate, would have been considerably less than the sum which, by the said order of 2d March, 1857, the said parish was required to contribute towards the said rates respectively.

Upon this state of facts the overseers contended that the order of 2d March, 1857, was made upon an erroneous principle, both as regarded the sum to be contributed for sewers' rate, and the sum to be contributed for general rate, and that it was null and void. On the other hand, the Board contended that the order was made upon a correct principle, and also that they had determined the proportion of benefit according to their discretion, and that their decision was conclusive.

The magistrate, being of opinion that the said order was a good and valid order, as regarded both the said rates, gave judgment for the complainants, and ordered his warrant to issue for levying the amount mentioned in the said order, by distress and sale of the goods of the said overseers.

The question for the opinion of the Court was, Whether the said order of 2d March, 1857, was a valid order: it being admitted that, if the order was valid, the magistrate was right in directing a warrant to be issued as aforesaid. And it was agreed that no technical objections were to be taken on either side, but the case was to be decided on the merits.

*94] *Sir Richard Bethell, Attorney-General, for the respondents. —The order of 2d March, 1857, was good and valid. It was one object of The Metropolis Management Act, 1855, 18 & 19 Vict. c. 120, by dividing the Metropolis into districts, each including several parishes, to put an end to the old system of parochial government, and to secure the benefits derivable from the imposition of rates on wider areas than mere separate parishes. The Board constituted for any such district has, under the Act, to determine what amount is required to be levied for the general expenditure of the district; and that amount is to be charged upon the several parishes constituting the district, in proportions to be determined, not by the outlay in each, but by the aggregate rateable value of the property in each. There is nothing in the Act to show that the criterion of outlay or direct benefit is to be adopted in determining the rateability of each

(a) Local and personal, public.

parish. For rating purposes, the whole district is to be treated as though it were a single parish; through all the parts of which a parochial rate would be equally distributed. The question turns upon the proper construction of sects. 158 and 159. Sect. 158 enacts that "Every vestry and district board shall from time to time, by order under their seal, require the overseers of their parish, or of the several parishes in their district, to levy, and to pay over to the treasurer of such vestry or board, or into any bank in such order mentioned, and within the time or times thereby limited, the sums which such vestry or board may require for defraying the expenses of the execution of this Act (and such orders may be made wholly or in part in respect of expenses already incurred, or of expenses to be thereafter incurred); and every such vestry and board shall distinguish in their orders sums required *for defraying expenses of [*95 constructing, altering, maintaining, and cleansing the sewers, or otherwise connected with sewerage, and also, where" stat. 3 & 4 W. 4, c. 90, "or any other Act by virtue whereof land is rated in respect of expenses of lighting at a less amount in proportion to the value thereof than houses, or is wholly exempted from being rated in respect of such expenses, is in force in any parish, or any part of any parish, at the time of the passing of this Act, distinguish, as regards such parish, or part, the sums required for defraying expenses of lighting their parish or district, from sums required for defraying other expenses of executing this Act; but every such vestry and board may cause to be raised as expenses connected with sewerage such portion of the expenses incident to the conduct of their business in relation to sewerage, in common with the conduct of their other business under this Act, as to such vestry and board may seem just; and the overseers or collectors, in the receipts to be given for the sums levied or collected by them, shall distinguish the rate in the pound required for sewerage expenses, and the rate required for the other expenses of this Act." And sect. 159 enacts, that "where it appears to any vestry or district board that all or any part of the expenses for defraying which any sum is by such vestry or board ordered to be levied as aforesaid, have or has been incurred for the special benefit of any part of their parish or district, or otherwise have or has not been incurred for the equal benefit of the whole of their parish or district, such vestry or board may, by any such order, direct the sum or sums necessary for defraying such expenses, or any part thereof, to be levied in such part, or exempt any part of such parish or district from the levy, or require a less rate to be *levied thereon, as [*96 the circumstances of the case may require; and any such board may refrain, where any entire parish ought in their judgment to be so exempt, from issuing an order for levying any money thereon, notwithstanding they may issue an order or orders for levying sums upon any other parish or parishes in their district." The order in dispute is framed in strict compliance with the 158th section, distinguishing between the sums required for sewerage expenses, and those required for other expenses. Sect. 159 gives the Board a discretion to exempt unbenefitted portions of the district from the levy, or to reduce the amount of the levy in partially benefitted portions. And the Court can see, from the facts stated in the case as to the discus-

sions at the several meetings of the respondents therein referred to, that the respondents have exercised their discretion in this respect, after taking all the circumstances into consideration. That being so, the Court will not interfere with the result. The opposition to the determination of the Board is, in reality, confined to The St. Katherine Docks Company. Those docks are, it may be, inconsiderably benefited by the expenditure of the rates. But they increase considerably the traffic all round them, and impose a great amount of wear and tear on the neighbouring streets and roads. This fact is an illustration of the good sense and wisdom of the Legislature in dividing the metropolitan rateable areas into large districts. Had the Board declined to exercise its statutory discretion, the Court might have ordered them to do so; but no ground exists for the Court's interference with the discretion when exercised.

*97] Sir *Fitzroy Kelly*, *contra*.—The Metropolis *Management Act, 1855, has done no more than transfer the management of the metropolitan parishes from the parochial authorities to the District Boards; it gives those Boards no power to substitute new modes of rating the parishes for those which formerly prevailed. Under the old system, the overseers of each parish had to inquire what sums were wanted for paving, lighting and sewerage in the parish; and those sums, and no more, were levied from the parish. The question is, whether the mere aggregation of the parishes into districts is to alter the law in this respect, so as to make one parish rateable for the paving, for instance, required in another. The answer is, that the law remains as it was before, and that the only alteration is in the managing body for each parish. Were it otherwise, there would be no guarantee that all the parishes would be fairly dealt with: some one parish might preponderate at the Board to the prejudice of the rest. Again, to hold that, with regard to the expenses of sewers, in particular, a parish which derives no benefit from the sewers in another may be charged with the maintenance of the latter, would be to repeal the old-established principle of the law of sewers, that property is rateable to sewers' rate according to the benefit derived by such property from the sewers: *Dore v. Gray*, 2 T. R. 358, *Masters v. Scroggs*, 3 M. & S. 447, *Rex v. Commissioners of Sewers for the Tower Hamlets*, 9 B. & C. 517 (E. C. L. R. vol. 17). *Metropolitan Board of Works v. Vauxhall Bridge Company*, 7 E. & B. 954 (E. C. L. R. vol. 90), decides that the Metropolitan Sewers Act, 1843, 11 & 12 Vict. c. 112, did not alter the ancient principle of rating; Lord Campbell, C. J., in delivering the judgment of the Court, saying *98] "*Prima facie*, assessments under a *sewers' rate must have regard to the benefit which the property derives from the sewers, and property which derives no benefit from the sewers is not liable to be assessed. The onus, therefore, lies upon the party who alleges that a different principle has been adopted by the Legislature." Sect. 164 of the present Act preserves the exemption from sewers' rate of property which was exempt therefrom at the time of the coming into operation of stat. 11 & 12 Vict. c. 112. And sect. 170 requires the Metropolitan Board of Works, in assessing the different parts of the Metropolis to the expenses of the Board, to have regard, "in the case of expenditure on works of drainage, to the benefit derived from such

expenditure by the several parts of the Metropolis affected thereby." Beneficial occupation is in all cases the test of rateability: *Hackney and Lamberhurst Tithe Commutation Rent Charges*, E. B. & E. 1 (E. C. L. R. vol. 96). Moreover, if the Board require the whole of the rates, whether for sewerage or other purposes, to be levied on the parishes according to their rateable value, they do not preserve the distinction between rateable value for sewers' rate and for poor rate. By that means two parishes may be rated, under an order of the Board, for nearly the same amount of sewers' rate, although the rateable value of one of them for that purpose falls far short of that of the other.

Sir *Richard Bethell*, Attorney-General, in reply.—The argument on the other side is virtually restricted to an objection to the taking, by the respondents, from any one parish, an amount of sewers' rate greater than the outlay in that parish for sewers. But whatever may have been the law under the old system, *the simple question [*99 now is, whether the amount required, under The Metropolis Management Act, 1855, for sewers' rate, is not a portion of the sum required for defraying the expenses of the execution of the Act. The whole scope of the Act shows that it is so, although sect. 158 requires the sewers' rate to be kept distinct. The district, the aggregate of the parishes composing it, is, by the Act, substituted for the single parishes for all purposes of the Act; and the sewers' rate leviable under the Act is rather the total of the items of a great variety of miscellaneous expenses, for the first time authorized by the Act and directed to be classed together under that name, than a sewers' rate strictly so called. It is probable that great part of the very rate now in dispute was expended upon the general purposes of the Act, with a view to the benefit, not of any particular parish, but of the district at large. The exemptions from sewers' rate preserved by sect. 164 refer to the exemption of particular land situate in the different parishes, not to exemptions of the parishes as between themselves. [COCKBURN, C. J.—The exemptions go to reduce the rateable value of each parish as a whole.] They have nothing to do with the distribution of the sewerage expenses between the different parishes. If, as the appellants here do not deny, a malcontent parish receives some benefit from the rate imposed for the general benefit of all, the principles laid down in *Dorling v. Epsom Local Board of Health*, 5 E. & B. 471 (E. C. L. R. vol. 85), show that such a parish cannot object to its assessment to the rate. There is nothing in the present case to show that all proper calculations were not made by the respondents *before they, in the exercise of their discretion, determined [*100 the amount assessable upon the appellants; and upon the principle that *omnia præsumuntur rite esse acta*, this Court cannot rectify any mistake which may have occurred in the assessment.

COCKBURN, C. J.—I am of opinion that the decision of the magistrate, upon which this appeal is brought, was right and ought to be affirmed. The appellants contend that, although the parishes subject to the Metropolis Management Act, 1855, have by that Act been united into aggregates called districts, nevertheless the expenditure incurred by a District Board is to be so apportioned as that each parish in the district shall contribute the amount, only, of the outlay which takes place within its own limits. This contention is, in fact,

that the purpose and effect of the Act were simply to substitute district for parochial management, but not district for parochial expenditure and taxation. I think, however, that the object of the Act was to effect both these substitutions. It unites the various parishes into districts, in each of which a Board is to be created by election and representation, to do that which was formerly done by various local bodies, Commissioners, parish officers, and others appointed under a variety of Acts of Parliament. The expenses of executing the powers with reference to paving, lighting, watering, sewerage and other matters, conferred by the Act upon these Boards, are, by the 158th section, to be levied by each Board upon its district, by means of orders directed to the different parishes of which the district is composed, and of which the Board is, for *101] these purposes, the governing body. Now, had the *Legislature intended that each parish should contribute to these expenses in respect only of the outlay in each, I think that very different language would have been used in the 158th section. That section provides that the district Board shall, from time to time, by order under their seal, require the overseers of the several parishes in their district, to levy and pay over to the treasurer of the Board the sums which the Board may require for defraying the expenses of the execution of the Act. This language being quite general, and no reference being made to the amount of outlay which may be incurred in each parish, I think that it is clear, upon the whole, that the intention was that the rate to be levied should be a general rate throughout the district, to meet the expenditure incurred for the district at large. Then, in order to avoid any injustice which might be thereby sometimes occasioned to particular parts of the district, sect. 159, which follows, provides that, where it appears to any district Board that all or any part of the expenses to meet which the rate is ordered to be levied have or has been incurred for the special benefit of any particular part, or otherwise not for the equal benefit of the whole, of the district, the Board may throw the burden upon the parts specially benefited, and may exempt other parts altogether or diminish the amount required from them, even where the part thought entitled to exemption is an entire parish. This section leaves it to the Board to take questions of the exemption or relief of parts of the district from the rate into consideration, and shows that it is for the Board to decide them, in the exercise of its discretion. That being so, this Court cannot consider whether the Board has exercised the discretion, so *102] vested in it, rightly or wrongly. All that we can do is *to satisfy ourselves that the discretion has in fact been exercised: for, if the Board refused to exercise it, we might interpose to compel them to do so; but that is the extent to which, alone, we could interfere. It is true, as Sir Fitzroy Kelly pointed out in the course of the argument, that instances may occasionally occur in which injustice may be done by the preponderance of some one parish in the district over others, enabling it to influence unfairly the votes and decisions of the Board. That, however, was a matter for the Legislature to take into consideration when forming the various districts; and cannot affect the construction proper to be put upon the Act, which, indeed, the Legislature must not be supposed to have passed

without due previous consideration. The only difficulty which I have felt arose upon the question of the sewerage expenses: and has been completely set at rest by the lucid argument of the Attorney-General on this point. Powers relating to sewerage are amongst the powers conferred on the District Boards by the Act. They are not distinguished from the other powers; nor is separate taxation to be levied to defray their execution, ~~give~~ in so far as sect. 158 provides that a distinction is to be made, in the orders of the Boards, between the sums required for expenses of sewerage and those required for other expenses. Sir Fitzroy Kelly suggested that this provision was in accordance with the ancient principle of law relating to sewers' rate, that such property, only, is amenable to it as benefits by the sewers. And he cited, in support of his argument, sect. 164, which preserves the exemption from sewers' rate of land theretofore exempt. It is clear, however, that that section operates merely as a direction to the overseers what property in their respective parishes to exempt from the rate; and that it has no reference to the distribution, [*103] by the Board, between the component parishes of the district, of the sums to be levied for the purposes of the Act. It was urged upon us, with much force, that, if the taxation authorized by the Act is to be levied indiscriminately upon the rateable value of the property in the different parishes, two neighbouring parishes may be assessed to sewers' rate on the footing of their rateable value to poor rate; although the rateable value of one of them to sewers' rate may be far less than that of the other, however much the two are on an equality in respect of rateability to the poor rate. It may be that it would be the duty of the Board, in such a case, to take that circumstance into consideration in making an order for the apportionment of sewerage expenses between those parishes, and not, in so doing, to be guided merely by the rateable value of the property in them, respectively, liable to the poor rate. But there is nothing before us to show that this, if necessary, was not done in the present case. It being admitted, therefore, that sewerage expenses come under the head of the expenses to be defrayed as provided by the 158th section, the only objection made to the order of the Board seems to be that, in distributing among the constituent parishes the sums required to be levied for the common purposes of the district, they have not taken into consideration the amount of the outlay in each separate parish. It appears to me, however, that they were not bound to do so by the Act, which has altogether superseded the old parochial system, and to the provisions of which, alone, we must have regard. In my opinion the Board have acted in conformity with the expressed intention of the Legislature; and the magistrate was right in coming to that conclusion.

*WIGHTMAN, J.—I was obliged to leave the Court before [*104] the conclusion of Sir Fitzroy Kelly's argument. I therefore take no part in the judgment beyond saying that, as far as I have considered the question, I am of the same opinion as the rest of the Court.

CHOMPTON, J.—I am of the same opinion. We are bound to say that the magistrate has not acted improperly, unless we can see quite clearly that the rate complained of was invalid. That, however, does

not in any way appear. The main question between the parties is, whether, upon the general construction of The Metropolis Management Act, 1855, the Legislature has substituted district management for parochial, both as regards management and as regards taxation and expenditure, or as regards management only. I have felt satisfied, from the outset of the case, that the intention of the Legislature was to substitute the district for the parish in every respect; not to keep the parishes distinct for purposes of taxation and expenditure, though putting them under new management. In my opinion, therefore, the rate in dispute was a district tax. It is said that it ought to be distributed among the parishes composing the district, according to the outlay in each. The Act, it is true, lays down no precise principle by which the distribution is to be regulated. My own opinion, however, is that the Legislature intended to leave the principle of distribution very much to the discretion of each Board. It is clear, at all events, that the principle of direct benefit is not that to be applied; the rate is a district rate, and is to be levied for defraying the expenses of the execution of the Act in the district. Nor can the ancient principle with respect to sewers' rates, that they are leviable

*105] on such property only as is directly benefited, apply here. A rate levied for defraying what are called sewerage expenses under an Act of Parliament of the kind before us, is a very different thing from a sewers' rate strictly so called, and the indirect benefit arising to a parish in the district from that expenditure may be very much greater than that which is direct. The question, then, comes to this, whether the Board, in distributing the rate among their constituent parishes, have complied with the general directions of the statute. The Act does not in terms state how the Board are to proceed. I think, however, that the method adopted by the Board, in distributing the rate according to the rateable value of each parish, was a fair one. It may be that, in determining the rateable value of each parish, they ought to take into account the exemptions in favour of certain descriptions of property, contained in sects. 163, 164 and 165 of the Act; but it does not appear that there is any such property in the appellants' parish, or that, if there is, the Board have not taken that fact into account. Nor is it shown that the Board have acted improperly in any way. By sects. 158 and 159 the Legislature have left it to the Board to look at all the circumstances and exercise their discretion thereon; considering, amongst other things, whether or not the principle of direct benefit is to be in any way acted upon. No discretion in the matter is given either to the magistrate or to this Court. Even if the Board have not taken all the circumstances into consideration, I think that we cannot interfere if they have exercised their discretion. In the present case they have done so, and it does not appear that they have passed over any matter which they ought to have

*106] entertained. Had an application been made to them to relieve from liability a particular part of the district, claiming to be entitled to the benefit of the 159th section, and had they wholly refused to listen to it, we could have interposed to make them consider it. But we have no jurisdiction to interfere with the result at which they, after consideration of all the circumstances, have arrived.

BLACKBURN, J.—I am of the same opinion. We have no jurisdic-

tion to do more than consider the question submitted to us by the magistrate, namely, whether the order of the Board of 2d March 1857, was valid. It is said that this order was invalid on the ground that it proceeded upon an erroneous principle of apportionment of expenses between the different parishes in the district; and that less ought to have been apportioned to the appellant parish and more to others. But I think that, even if that were so, the order would not thereby be invalidated. The effect of sects. 158 and 159 of the Act is that all the expenses together constitute one fund of district expenses; and the Attorney-General is quite right in saying that the whole amount is to be levied on the whole district, though apportionable among the constituent parishes, in the manner provided by those sections. Sect. 158 says that the Board is to make orders on the parishes to levy the sums required by the Board for defraying the expenses of the execution of the Act. This section is silent as to the principle on which the sums are to be apportioned between the parishes; and, had the Act contained no further provision on the subject, I should have thought that the proper principle would be to divide the sums equally and rateably among the parishes, according to their respective rateable value. But sect. 159 follows, and gives the Board jurisdiction to take into *consideration the fact of the expenses, in whole or in part, having been incurred for the special benefit of part of the district, or not for the equal benefit of the whole district, and thereupon to levy the expenses, or any part, in the part of the district specially benefited, or to exempt any part of the district from the levy, or require a less rate to be levied thereon, as the circumstances of the case may require. Now, here, the Board has taken these circumstances into consideration, and has thereupon made an apportionment of the expenses. Sir Fitzroy Kelly says that, in so doing, they have not made certain allowances which they ought to have made. I do not think, however, that we can enter into that inquiry. The Legislature has not provided for an appeal from the exercise by the Board of their discretion, and we must assume that the discretion has been duly and properly exercised. Otherwise, the absurd consequence would follow, that an error by the Board in the principle of apportionment, however slight and trivial, would invalidate their order and make the entire rate levied thereunder void. That would be a most unreasonable construction to put upon the Act. It is clear to me that the intention of the Legislature was to give jurisdiction to finally determine the apportionment of the expenses to the Board, the local Parliament, which, it was assumed, would keep equality and fairness in view: equality, that is, as to the general principle, and fairness as to the mode of carrying it out in cases where allowances ought properly to be made. The whole matter is confided to the discretion of the Board, without appeal, and without a reservation of power to any other tribunal to review their decision.

Judgment for the respondents.

- *108] *The QUEEN, on the prosecution of the Governor and Company of the CHELSEA WATERWORKS, Appellants, v. The Overseers of SAINT MARY, PUTNEY, SURREY, Respondents. *May 30, June 9, June 11.*

The pipes and reservoirs of a Waterworks Company were so placed in the several parishes in which they were respectively situate, that the whole together formed one apparatus for the supply of water, in some only of such parishes, to the customers of the Company; a part of such apparatus being rateable to the poor rate in each parish.

Held, that it was not a correct principle, in order to ascertain the rateable value of the apparatus in any one particular parish, to calculate the total rateable value of the whole apparatus in all the parishes, and then divide that value among the several parishes, according to the quantity of land occupied by the apparatus in each of them.

UPON an appeal to the Surrey Quarter Sessions by The Chelsea Waterworks Company against a rate for the relief of the poor of the parish of Saint Mary, Putney, by which the appellants were assessed at the net annual value of 8000*l.*, the appeal was, by consent, allowed, and the assessment was reduced to 3000*l.*, subject to the following case for the opinion of this Court.

The appellants are the Company mentioned in and continued incorporated by "The Chelsea Waterworks Act 1852."(a) The respondents are the churchwardens and overseers of the poor of the parish of Putney, in the county of Surrey. The Company sell water to the inhabitants of a certain district within which they are empowered so to do by virtue of the above mentioned Act. This district is situate wholly within the county of Middlesex. The Company have no power to sell and do not sell any water to any person or persons or for any purpose within the parish of Putney, or within the county of Surrey. The water sold as above mentioned is obtained in the following manner. A part of it is drawn off from the river Thames at Seething Wells, in the parish of Kingston, in Surrey, into reservoirs and filtering beds in the said parish of Kingston; and it is then, by means of pumping engines situated in the same parish, forced and conveyed through pipes, which are laid down in the parish of Kingston and other parishes in Surrey, including the parish of Putney, from the said reservoirs and filtering beds in the parish of Kingston into certain covered reservoirs in the parish of Putney. From these last mentioned reservoirs the water passes through other pipes, which are laid down in the parish of Putney, to the banks of the river Thames, over which it is conducted by pipes, which form an aqueduct across the river from the parish of Putney to the parish of Fulham; and thence the water is conveyed, by means of other pipes, into the Company's district in Middlesex, where it is supplied to the Company's consumers. The residue of the water so sold by the Company, as aforesaid, is taken from the same part of the river Thames, at Seething Wells. It is forced by the before mentioned pumping engine through another set of pipes laid down in the said parish of Kingston, and in other parishes in Surrey, including the parish of Putney, into an open reservoir in the parish of Putney; and thence it is conveyed,

(a) Stat. 15 & 16 Vict. c. clvi., local and personal, public. "For extending the Chelsea Waterworks, and for better supplying the city of Westminster and parts adjacent with water."

by means of other pipes in the parish of Putney and the before mentioned aqueduct across the Thames, into the parish of Fulham, and thence, by means of other pipes, into the Company's district, where it is delivered for the purpose of street watering. It is essential, for the purpose of supplying the water in the Company's district, either that it should be collected in and passed through the before mentioned reservoirs in *the parish of Putney, or else that some [*110 other contrivance should be resorted to for the purpose of keeping the water at a sufficiently high level to admit of its flowing to the highest part of the Company's district. It is intended that the water should always be collected into and passed through the said reservoirs. The reservoirs, filtering beds and engines, in the parish of Kingston, the reservoirs in the parish of Putney, and the pipes in the several parishes, as used by the Company, form an apparatus by which water is drawn from the Thames at Seething Wells, and collected, conveyed, sold and distributed as above mentioned. The portion of the apparatus which is situate in the parish of Putney occupies nine acres of land, and consists of, first, certain pipes, occupying two acres, three roods and thirty perches of land, by means of which the water, after being passed through the company's mains in the parish of Kingston, is conducted continuously into one or other of the said reservoirs in the parish of Putney; secondly, certain reservoirs occupying five acres and one rood of land; thirdly, certain other pipes, occupying one acre of land, by means of which the water is conveyed from the said reservoirs to the banks of the Thames; fourthly, certain other pipes, which occupy the remainder of the said nine acres of land, and which form that portion of the said aqueduct across the Thames which lies in the parish of Putney, the remainder of the aqueduct being in the parish of Fulham. The whole apparatus is so constructed and placed in the several parishes in which it is situate that a part is rateable in each parish; each and every part of the apparatus, as the same is constructed, and each and every part of the land occupied by it, is necessarily used and occupied for the purpose of supplying water *to the Company's customers, as before mentioned; and none [*111 of the water supplied by the Company to its customers can be supplied without the aid of every part of their said apparatus. The profits of the Company are derived exclusively from the sale of the said water to its consumers in the Company's said district. The rateable value, according to The Parochial Assessment Act, of the whole apparatus of the Company, in the several parishes in which it is situated was, for the purposes of the case, to be taken to be a certain sum which had been agreed upon between the parties, the same being calculated at the rate of so much per acre for all the land occupied by the apparatus. The charges and deductions which had been taken into account in making the estimate were those which are specified in The Parochial Assessment Act, and there were no special circumstances affecting the portion of the apparatus which is in the parish of Putney. It was to be assumed, for the purposes of the case, that the rateable value of the portion of the Company's apparatus which is within the parish of Putney had been ascertained by first taking the rateable value of the whole apparatus in the several parishes in which

it is situated, then subdividing the amount among the said several parishes according to the quantity of land occupied by the apparatus in each parish. If that principle be correct, the rate was, by agreement, to be amended, and was to stand for the sum of 2800*l*. If that principle be not correct, then the rate was, by agreement, to be amended, and to stand for the sum of 2000*l*.

The question, therefore, for the opinion of the Court was, Whether the rate, when amended, ought to stand for the sum of 2800*l*., or for the sum of 2000*l*.

*112] *Bovill*, for the appellants.—The principle of first taking the rateable value of the whole of the Company's apparatus in the several parishes in which it is situate, and then subdividing the amount among the several parishes, according to the quantity of land occupied by the apparatus in each parish, is erroneous. The Company derive no profit in Putney from the parts of the whole apparatus locally situate there, which are parts directly earning nothing, but indirectly conducing to earnings elsewhere. Their local rateable value in Putney is, therefore, the sum which would pay the rent of the land, taken by itself, which they occupy in Putney, and the profit on fixed capital invested therein: *Regina v. Overseers of Mile End Old Town*, 10 Q. B. 208 (E. C. L. R. vol. 59), *Regina v. West Middlesex Waterworks*, 1 E. & E. 716 (E. C. L. R. vol. 102). With this the value of the Company's apparatus situate elsewhere has nothing to do. [He was then stopped.]

T. Jones (Northern Circuit), for the respondents.—The decision in *Regina v. West Middlesex Waterworks* proceeded upon the particular facts there involved, and does not conflict with the general rule applicable to all such cases as the present, laid down in *Regina v. The Cambridge Gas Light Company*, 8 A. & E. 73 (E. C. L. R. vol. 35), namely, that the rateable value of the land occupied by the apparatus, pipes, &c., of the Company in the different parishes, is the sum which a tenant would pay yearly for them, less certain deductions; and that such value is to be distributed among the assessments of the several parishes in proportion to the quantity of land occupied by the apparatus, &c., in each parish. The Company are *rateable to the
*113] extent of the increased value of the land in Putney, in consequence of its being used by them for the purpose of conveying the water: *Rex v. Brighton Gas Light Company*, 5 B. & C. 466 (E. C. L. R. vol. 11).

Bovill, in reply.—In *Regina v. The Cambridge Gas Light Company* the question was how to distribute the rateable value of the Company's apparatus among the assessments of parishes in each of which the Company supplied gas. That case, therefore, is not in point. The present case is not distinguishable in principle from *Regina v. West Middlesex Waterworks*. *Rex v. The New River Company*, 1 M. & S. 503, *Regina v. Hammersmith Bridge Company*, 15 Q. B. 369 (E. C. L. R. vol. 69), *Regina v. Great Western Railway Company*, 15 Q. B. 379, 1085, *Mayor, &c., of Liverpool v. Overseers of West Derby*, 6 E. & B. 704 (E. C. L. R. vol. 88), are also in favour of the appellants. Whatever difficulty there may be in determining the true principle of assessment, that adopted in this case was clearly

wrong, and the appellants are, on that ground, entitled to the judgment of the Court.

Cur. adv. vult.

BLACKBURN, J., now delivered the judgment of the Court.(a)

In this case, on appeal by The Chelsea Waterworks Company against a rate made on them by the parish of Putney, for the relief of the poor of the parish, the Quarter Sessions refer to this Court only one question. *If the principle stated in the 16th paragraph [*114 of the case is correct, the rate is to be amended, and stand for 2800*l*. If that principle be not correct, then the rate is to be amended, and stand for 2000*l*. The general question as to the principle on which the rateable value of such property should be apportioned is one of great difficulty and importance, which has recently been the subject of much consideration; but in this case we are not asked nor authorized to say what is the correct principle, but only to determine whether this particular principle is right. Now that principle is, that the rateable value of the whole apparatus of the Company in all the parishes in which it is situate is to be ascertained, and then divided "among the said several parishes according to the quantity of land occupied by the apparatus in each parish." If this principle be correct, every square foot of land occupied by the apparatus is to be rated at the same rate, without regard to the situation or nature of the land, whether it was originally part of a barren heath, like Putney Heath, or part of the market ground of Fulham, and without regard to whether it be merely land occupied by pipes under the surface of the highway, or whether it be land upon which expensive buildings have been erected for the purpose of converting it into filtering beds or reservoirs. We have no difficulty in saying that this principle is not correct; we cannot sanction it; and therefore we must answer the only question put to us by saying the rate must stand for 2000*l*.

Judgment for the appellants. The rate to be amended to 2000*l*.

(a) Cockburn, C. J., Wightman and Blackburn, Js.

*The QUEEN *v.* HERFORD. June 9, 11. [*115

A coroner has no *ex officio* jurisdiction, at common law, to hold any other inquest than one on a dead body, *super visum corporis*. He cannot, therefore, hold an inquest to inquire into the origin of a fire by which no death has been occasioned.

Prohibition lies to a Court of criminal, no less than to one of civil, jurisdiction.

MELLISH had obtained a rule calling upon the defendant, the coroner for the city of Manchester, to show cause why a writ of prohibition should not issue, directed to him, to prohibit him from further holding an inquisition respecting the origin of a fire at the shop and premises of Levy Kreigsfeld, No. 8, Palatine Buildings, Hunt's Bank, in the said city of Manchester.

It appeared from the affidavits that the said Levy Kreigsfeld was a dealer in India rubber and mackintosh goods, carrying on business on premises which were usually locked up at night. On the evening of 27th March last he locked up the premises and went home; shortly afterwards, a fire was discovered in the shop, and the chief constable of

the city of Manchester suggested to the coroner the propriety of holding an inquest to ascertain, if possible, the origin of the fire. The coroner accordingly issued his precept to the chief constable to summon a jury, and proceeded to hold the inquest as had been suggested to him; acting solely upon that suggestion, and from a regard to his duty as coroner, and to the public interest involved in the discharge of such duty. Levy Kreigsfeld was called upon to attend the inquest, and he did so, accompanied by counsel, who objected that the coroner had no power to hold an inquest concerning a fire. The coroner, nevertheless, entered upon and continued the inquiry for some hours, *116] *during which time he examined Levy Kreigsfeld on oath, and then adjourned the inquest.

It further appeared that, in London, Lincoln, Doncaster and some other places, the coroners have of late years occasionally held inquests in cases of fire, when they were required to do so.

After the adjournment of the inquest, *Mellish* obtained the present rule.

Sir *William Atherton*, Solicitor-General, *Wheeler* and *Fonblanque* now showed cause.—There are two points for consideration: First, whether prohibition is the proper course for raising the question involved; which is, Secondly, whether a coroner has, at common law, the jurisdiction which the defendant has assumed, of holding an inquest to inquire into the origin of a fire by which no death has been caused. Now, first, prohibition is not the proper mode of proceeding in criminal cases; and the present is a criminal, or, at all events, not a civil case. The jurisdiction which the defendant has assumed is of a similar character to that which he exercises in holding an inquest on a death; and is not civil. In *Blackstone's Commentaries*, book III, c. vii., p. 112, the courts to which a writ of prohibition may issue are enumerated; and none of them are Courts of criminal jurisdiction. [CROMPTON, J.—In Com. Dig. tit. "*Prohibition*" (F. 6), instances are given of a prohibition, "If the suit be for a criminal matter."] 2 Inst. 600, there cited by Comyns, is a comment upon the statute of Edw. I., entitled "*prohibitio formata de statuto articuli cleri*;" the sole object of which was to prohibit the spiritual Courts from taking cognisance of felonies. [CROMPTON, J.—The heading of the title in *117] Comyns is in general terms. And **Goulson v. Wainwright*, 1 Sid. 374, which he cites, shows that if articles ex officio, which require an answer upon oath, are exhibited in a spiritual Court against any person, for a criminal matter, such person may obtain a prohibition to that Court; though not if the matter is civil.]

Mellish, contrâ.—In the Admiralty Case, 12 Rep. 77, 78, it appears to have been assumed that the prohibition, there refused upon another ground, would have lain to the Admiralty Court, for want of jurisdiction to take cognisance of a criminal offence not committed on the high seas. It is true that the report says, "if one be sued in the Admiralty Court," &c.; but it appears from the context that the proceeding was for a criminal matter.

Sir *William Atherton*.—The suit in that case was clearly a civil one. The Courts to which prohibition will issue are enumerated also in Com. Dig. "*Prohibition*" (A. 1): and are, all of them, either civil or spiritual. Forms of the writ are given in *Fitzherbert*, de Nat. Brev.

tit. "*Prohibition*;" but none of them are framed for a criminal Court. In *Pomfraye's Case*, 1 Litt. 168, the main question in which was whether an information under the statute of usury, 87 H. 8, c. 9, was properly laid before justices in Sessions, or ought to have been prosecuted in the superior Court, the point whether prohibition would lie to the Court of Quarter Sessions was also mooted; and seems to have given rise to a difference of opinion, and to have been left undecided. *Grant v. Sir Charles Gould*, 2 H. Bl. 69, is an instance of an application for a prohibition to a Court martial; but there the objection that no prohibition would lie to such a Court was not raised; and [*118 the application was refused on another ground, namely, that as the applicant had been in the receipt of pay as a soldier, the Court martial had jurisdiction to try him, although he had assumed the military character merely for recruiting purposes. Secondly, the coroner has, at common law, the jurisdiction which the defendant has assumed in the present case; and no statute has put an end to it. The office of coroner is, as stated by Blackstone, Commentaries, book I., c. ix., p. 347, of equal antiquity with that of sheriff. At the following page Blackstone gives a description of its duties; and another is to be found in Hale's P. C. pl. 2, c. 8, vol. 2, p. 56 (ed. 1800, by Dogherty). Neither of these, it is true, includes the holding an inquest on the cause of a fire among those duties; but neither of them is exhaustive. On the other hand, this particular jurisdiction, if it existed at common law, has not been taken away by any statute; although many statutes, *Magna Charta* for instance, cap. 17, as is shown by Lord Coke in his comment upon it in 2 Inst. 81, 82, have deprived the coroner of certain of the powers anciently appertaining to his office. Notwithstanding those statutes, the coroner's common law jurisdiction extends far beyond that which is now popularly considered as its limit: namely, the holding inquests super visum corporis. Nathaniel Bacon, in his *Historical and Political Discourse of the Laws and Government of England*, cap. 23, sec. 2, p. 41 (ed. 4, of 1789), says that in the Saxon Kingdom the coroner's work "was to inquire upon view of manslaughter, and by indictment of all felonies as done contra coronam, which formerly were only contra pacem, and triable only by appeal." The same author, in cap. 69, p. 179, treating of the jurisdiction of coroners in the reigns of *Henry [*119 III., Edward I., and Edward II., says that the statute of West. 1, c. 10, "holds" them "to the work of taking inquests and appeals, by indenture between themselves and the sheriff: and these were to be certified at the next coming of the justices." This writer is said, on the title page, to be authenticated by Selden. The statute "*De officio coronatoris*," 4 Edw. 1, stat. 2, is declaratory, and merely in affirmance of the common law. It does not specify the particular jurisdiction of the coroner now in question, to hold inquests on fires; but it mentions as the duty of these officers, in addition to viewing dead bodies, "*quod accedant ad*" "*domorum fractores, vel ad locum ubi dicitur thesaurum esse inventum*." Besides, the statute ends very abruptly, and is probably imperfect; omitting, as it does, to mention so well defined a part of the coroner's duty as the holding an inquest on the bodies of those who die in gaol. Jervis, in his work *On the Office of Coroners*, pp. 24, 32, and 33, citing Hawkins's *Pleas*

of the Crown, book ii., c. 9, sects. 21 and 35, points out that this statute does not restrain the coroner from any branch of his power, nor excuse him from the execution of any part of his duty, not mentioned in the statute, and which was incident to his office at common law. In order, therefore, to ascertain what were the power and duties of the coroner at common law, reference must be made to the old authorities. First of these, in point of antiquity, is Andrew Horne's *Mirror of Justices*; which is thus alluded to in Reeve's *History of the English Law*, vol. 2, p. 358 (ed. 2): "The *Mirror of Justices* is a book, whose consideration may properly belong to this reign" (Edw. II.) "This singular work has raised much doubt and difference of opinion concerning its antiquity. Some have pronounced it
 *120] older than the Conquest; others have ascribed it to the time of Edward II. Both these opinions may be partly right. There may perhaps have been a work by this name as early as the date supposed; but whoever judges from the internal evidence of this book will be satisfied, that great part of it is of a period much later, and certainly written after Fleta and Britton; for it states many points of law, as it were, in a state of progression somewhat receding from those writers, and approaching nearer to those of later times. It is probable that Andrew Horne, whose name it bears, might take up an ancient book of that name, and work it into the volume we now see, in the reign of this king, or at the end of the former; and if so, we should expect that whatever it propounds was actually law in the reign of Edward II." In cap. 1, sect. 13, of the *Mirror*, translation by Hughes, pages 38 to 48 (ed. 1768), entitled "Of the Office of the Coroners," there is a very full account of the coroner's duties and jurisdiction. The section commences thus: "To coroners anciently were enjoined the keeping of the pleas of the Crown, which extend now but to felonies and adventures. There are two kinds of coroners, general and special. To the office of general coroners it belongeth to receive the appeals of all the county, of felonies done within the year." It then states, that "special coroners are coroners of liberties, and of privileged places," and proceeds: "To the office of one and the other it doth belong, to view the carcases of the dead by felony, or by mischance; or to see the burnings and the wounds, and the other felonies, that is to say, every one in his bailiwick; and to see treasure trove and wrecks of the sea, and to take the acknowledgments of felony,
 *121] and to give the abjuration to flyers to sanctuary, and to take the inquests of felonies happening within their bailiwicks." Again, at page 42, it is stated: "Also, they used to inquire of burnings, and who put to the fire, and how; and whether it were by felony or mischance; and if of felony, of whose felony, and who were the principal, and who the accessaries, and who were the threateners thereof." [BLACKBURN, J.—Can you produce any reported instance of an inquest held on a fire by a coroner?] No such instance has been discovered; probably because coroners, since the creation of justices of the peace by stat. 1 Edw. 3, c. 16, allowed the justices to exercise their functions in this respect. Mere disuse, however, would not deprive the coroners of their jurisdiction. The next authority in point of time is Bracton, who, in lib. 3, folio 121, cap. 5, "*De officio coronatorum supra homicidium*," says, "*Cum autem contingat homi-*

cidium fieri quandoque in domibus, quandoque in villis, quandoque in vicis, quandoque in campis extrâ villam, et etiam in nemoribus, et ad coronatores pertineat de hujusmodi occisiis cognoscere et de interfectore, quis ille fuerit, si nesciatur, diligentem facere inquisitionem: ideo bonum est videre quale sit eorum officium in hac parte. Est igitur eorum officium quòd quàm citò habuerint mandatum a ballivo domini regis, vel a probis hominibus illius patriæ: accedere debent ad occisos vel vulneratos, sive ad submersos vel subitò mortuos, et ad domorum fractiones, et ad locum ubi dicitur thesaurum fuisse inventum, et hoc facere debent statim et sine morâ aliquâ." So Fleta, lib. 1, c. 18, § 5, p. 20 (ed. 1647, by Selden), "De coronatoribus," writes, "Imprimis fideliter præsentent de omnibus murdris, homicidiis, felonis, per quem, quando, et ubi, in terrâ videlicet, vel in aquâ, bosco, placio, vel marisco, *vel in villâ, vel extrâ." Of the work of Fleta, Reeve (*History of the English Law*, vol. 2, p. 279 (ed. [*122 2]), says, that it is "a treatise upon the whole law, as it stood at the time this author wrote," and that he "followed Bracton in the manner and matter of" the work, having adopted his plan, and, in many instances, transcribed whole pages from him. "He did not, however, confine himself to Bracton as his sole guide, but had also an eye to Glanville. Many obscure passages in those writers are illustrated by Fleta." Again, in Britton, c. 1, sect. 3, p. 11 (Kelham's translation, 1762), it is said: "Also, it is our pleasure, that as soon as any felony or misadventure has happened, or treasure be found designedly concealed underground, or in case of the rape of women, or of the breaking of our prison, or of a man wounded almost to death, or of other accident happening, that the coroner, as soon as ever he has notice of it, issue his precept to the sheriff, or the bailiff of the place where the accident happened, that at a certain day he cause to appear before him at the place where the accident happened, the four adjacent townships, and more if need be, by whom he may inquire of the truth of the casualty." And, in sect. 32 of the same chapter, p. 25: "And whereas we have declared above, that coroners ought to make enrolments of appeals of felonies, of the death of a man; let them have the like power in appeals of rape, robbery, larceny, and in appeals of every other kind of felony." These authorities show that Lord Coke did not accurately state the law when he laid down, in 4 Inst. 271, that "the coroner can inquire of no felony but of the death of man, and that super visum corporis." [BLACKBURN, J.—In the *Liber Assisarum*, 27 Edw. 3, fol. 141, pl. 55, it was held that the coroner has no *power to entertain any indictment except super visum corporis. And in Yearb. 35 H. 6, pl. 33, [B], fol. 27, the law is [*123 stated to the like effect as to all coroners, except those in Northumberland, by the custom of which county the coroners may take cognisance of all felonies.] In *Garnett v. Ferrand*, 6 B. & C. 611, 620, (E. C. L. R. vol. 13), Bayley, J., said, "At common law the coroner had power to hear and determine felonies," "therefore his Court was analogous to the ordinary Courts of law, but his powers were abridged by Mag. Car. c. 17." At page 32 of *Jervis on the Office of Coroners*, the author says: "It would seem, from the statute de officio coronatoris, that the authority of coroners with respect to felony was not limited to inquests of death only; for by that statute they are

directed to inquire of breakers of houses; and Britton, in his paraphrase upon that statute, treats of their duty with reference to inquiries concerning rape and prison-breach. It is, however, said, and supported by great authority, that coroners have no power *ex officio* to inquire of any felony, but only of the death of a man upon a view, and cannot take an indictment in any other case. But this is doubted by Hawkins, who contends that coroners may still, if they please, inquire of rape, prison-breach, and house-breaking, their powers in that respect never having been expressly taken from them. For the maintenance of this opinion he relies upon the express words of the statute *de officio coronatoris*, and upon the commentary of Britton before alluded to, and argues, that the authorities, 27 Ass. 55 and 85 H. 6, pl. 27 b, (a) upon which the contrary doctrine is founded, do not *124] decidedly resolve the point, this question having "there arisen incidentally merely, and by way of argument, upon a collateral discussion." Hawkins's is the better opinion. The coroner still has the larger jurisdiction which that writer assigns to him. *Magna Charta*, c. 17, did not, as Lord Coke erroneously supposes, take it away. It is thereby enacted, "*Nullus vicecomes constabularius coronator vel alii Ballivi nostri teneant placita coronæ nostræ.*" But the pleas of the crown there intended are matters in which there is both accusation and answer by the accused, neither of which takes place on an inquisition before the coroner. The inquisition does not become an indictment until it is signed and returned. [BLACKBURN, J.—Does not the fact, that no trace of the exercise by the coroner of the jurisdiction for which you contend can be discovered, tend to show that cap. 17 of *Magna Charta*, which is certainly capable of such a construction, took it away?] As has been already observed, mere desuetude would not do away with the jurisdiction, nor can that circumstance affect the construction of the statute. [WIGHTMAN, J.—Could the coroner take any fee for holding an inquest on a fire?] Probably not; but when the office was first created, he could take no fees at all. (b)

Mellish and Fearnley, contra.—The question is concluded by authority. Coke, Hale, and all subsequent writers on the subject, except Hawkins, are clearly of opinion that a coroner has no jurisdiction to inquire into anything except the death of man, and that *super visum corporis*. Lord Coke, in his comment on cap. 17 of *Magna Charta*, *125] clearly implies that, in his opinion, the "coroner had no further jurisdiction, even before that statute. His words are: (c) "But what authority had the sheriffs in pleas of the Crown before this statute? This appeareth by Glanville, that the sheriffs in the tourn (for that is to be intended) held plea of theft, for he saith; *excipitur crimen furti, quod ad vicecomitem pertinet, et in comitatibus placitatur*; but he may inquire of all felonies by the common law, except the death of man. And what authority had the coroner? The same authority he now hath, in case when any man come to violent, or untimely death, *super visum corporis*, &c. Abjurations and outlaw-

(a) Apparently a misprint for "pl. 33 [B]."

(b) See Stat. Westm. I. c. 10., declared by Lord Coke (2 Inst. 176) to be in affirmance of the common law.

(c) 2 Inst. 32.

ries, &c., appeals of death by bill, &c. This authority of the coroner, viz., the coroner solely to take an indictment, *super visum corporis*; and to take an appeal, and to enter the appeal, and the count remaineth to this day. But he can proceed no further, either upon the indictment, or appeal, but to deliver them over to the justices. And this is saved to them by the statute of W. 1, c. 10. And this appeareth by all our old books, book cases and continuall experience." There is some difficulty in distinguishing between the ancient jurisdiction of the coroner in appeals and in indictments. The probability, however, is, that appeals were not brought in the Court of the coroner, but in the county Court, which was distinct from it, and of which both the sheriff and the coroner were members; and that in the county Court appeals of all other felonies than the death of a man were taken before the sheriff; and appeals of felonies relating to the death of a man, before the coroner. Inquests on the dead, on the other hand, were taken in the coroner's separate Court only. It is also extremely *doubtful whether or not, in appeals of felony, the coroner was assisted by a jury. The statute *de officio coronatoris*, 4 Ed. 1, [*128 statute 2, perhaps leaves it an open question whether the coroner anciently had the jurisdiction contended for by the other side. But that statute is a mere abridgment of so much of Bracton's work as treats of the coroner's jurisdiction; and Bracton nowhere says that he has jurisdiction to inquire as to the burnings of houses. Apparently, therefore, the coroner, in Henry III.'s time, had no such jurisdiction. It is true that Bracton, in the passage cited on the other side, says that the coroner is to go "*ad domorum fractiones*," as well as to people dead or wounded; but it is clearly meant that he is to go there merely in order to see if a death has been thereby caused; and that he is to hold an inquiry only "*de homine occiso*," if, when he gets to the spot, he finds that a man has been killed. The same author, lib. 3, folio 122, c. 7, "*De officio coronatorum in raptu virginum*," shows that the coroner's jurisdiction in that respect is limited to hearing an appeal, and that he is not to hold an inquest. The jurisdiction is founded, only, "*si quis ab aliquâ de raptu fuerit appellatus, et factum recens fuerit*;" in which case "*attachietur appellatus*." Of the same nature is the coroner's jurisdiction "*de pace et plagis*;" as appears from the following cap. 8. "*Si quis de pace et plagis fuerit appellatus*," "*si plaga mortalis fuerit, et appellatus inveniat, statim capiatur, et captus detineatur, donec sciat utrum utrum vulnus convalescere possit vel non, si autem non et moriatur, appellati retineantur in prisonâ. Si autem convalescat, attachietur appellatus*." And in lib. III., fol. 146, cap. 27, where the author treats "*De appello de iniquâ combustione*," a similar course of procedure is laid down. He says, "*Si quis*" "*sedes alienas nequiter combusserit, et fugerit, si sit qui*" [*127 "*accuset, et sequatur, procedatur contra ipsum sicut de aliâ*" [*127 "*feloniâ; si non, tunc inquiratur veritas in adventu justitiariorum*." Fleta, who in other respects agrees with Bracton, omits to mention a visit *ad domorum fractiones* as part of the coroner's duty. Britton's is a very brief work, and not of such authority as the others. Its language is wider, but states the law too loosely and generally. The Mirror of Justices is of no authority whatever. It is not even known

with certainty when it was written; and it is very probably a treatise on the laws of the Saxons. The book contains so many gross inaccuracies relating to the jurisdiction of coroners, that no one passage in it can be considered more reliable than another. For instance, in the chapter from which the other side have made citations, cap. 1, sect. 13 (Hughes's translation, ed. 1768), it is said, at p. 41, that if a man be killed by false judgment, the jury of the coroners are to "declare who were the judges, who the officers to form the judgment and who accessaries, and if of false witnesses, who were they, and the jurors." Again, from the enumeration, at p. 42, of the different kinds of accessaries, it appears that the coroner, according to the author, was to inquire of accessaries after, as well as before, the fact. On the same page occurs the statement that "Coroners also ought to make their views of sodomies, and of monstrous births of children, who have nothing of humanity, or who have more of other creatures than of man." These passages are sufficient to show that the statement which follows, that coroners "used to inquire of burnings, and who put to the fire, and how," is one to which not the smallest authority can *128] attach. The statute of *Marlebridge, 52 H. 3, c. 24, enacts as follows: "*Justiciarii itinerantes de cætero non amercent villatas in itinere suo, eo quòd singuli duodecim annorum non venerint coram vice-comitibus et coronatoribus, ad inquisitiones de roberiiis, et incendiis, et aliis ad coronam spectantibus faciend'*; dum tamen de villatis illis venerint sufficientes, per quos hujusmodi inquisitiones plenè fieri possint: exceptis inquisitionibus de morte hominis faciend', ubi omnes duodecim annorum venire debent, nisi rationabilem habeant causam absentiae suæ." Lord Coke, commenting on this statute, mentions, as one of the mischiefs which it was passed to prevent, (a) "That when robbery, burning of houses, homicide, or other felony, was done, the sheriffe, for so much as pertained to him, or the coroner in case of the death of man, would summon many townships, and sometimes a whole hundred, where twelve would serve to make inquiry." And this construction, reddendo singula singulis, has always been put upon the statute. Again, by the *Articuli super chartas*, 28 Edw. 1, c. 3, it is enacted, that (b) "*Pur ceo que avant ces heures multe des felonies faite dedeins la vierge ount estre depunies, pur ceo que les coroners de pays ne soient pas entermis denquirer des tiels maners des felonies dedeins la vierge:*" "*ordeine est, que desormes in case de mort de home, ou office de coroner appent as viewes, et enquests de ceo faire, soit maund al coroner del pays, que ensemblement ove le coroner del hostel le roy face loffice que appent, et le metter en rolla.*" Lord Coke, in a note to this passage, says: "This is understood of felonies of the death of man; for the inquiry of that felony belongs to the *129] office *of the coroner of the vierge, and so it is" "in this Act explained, office del coroner appent a viewes et enquests de ceo faire." Again, in 4 Inst. 271, Lord Coke says: "As the sherif in his tourn may inquire of all felonies by the common law, saving of death of man, so the coroner can inquire of no felony but of the death of man, and that *super visum corporis*: he shall also inquire of the escape of the murderer, of treasure trove, deodands, and wrecks of

(a) 2 Inst. 147.

(b) Lord Coke's spelling is followed in this citation.

the sea." To the same effect is the statement by Staunford, in "*Les Pleez del Coron.*" 51 H.: "*Cest estatut*" (de officio coronatoris) "*quaunt al inquisition a prender, extenda soy totalement sur mort person, per que semble que le coroner ne peut inquerer dauter felony, forsque de mort d'homme.*" The author adds, that Britton, in fol. 3 of his work, had expressed the contrary opinion "*Que il peut inquier de rape de femme, et de debruser de prison, queux sont auter felonies, que nest morte d'homme.*" To these authorities may be added that of Hale, who, in his *Pleez of the Crown*, vol. 2, p. 56 (ed. 1800, by Dogherty), says: "For inquisitions. Regularly the coroner hath no power to take inquisitions, but touching the death of a man and persons subito mortuis, and some special incidents thereunto." So again, at page 65: "I. By what hath been before said it appears, that the coroner hath power to take an inquisition of felony of the death of a man, and likewise of certain incidents thereunto. 1. Of accessaries before the fact, but not of accessaries after. 2. Of the escape of the manslayer, that thereupon the township may be amerced, which is further confirmed by stat. 3 H. 7, c. 1. 3. Of his flight. 4. Of his goods and chattels. But he hath no power to take an inquisition of any other felony, though in some cases he hath *power to take [*130 appeals of other matters, as shall be said hereafter. 2 Co. Instit. p. 32. Only by custom in Northumberland the coroner hath power to inquire of other felonies." "But it is said that he may take the confession of him that breaks prison, and upon his record thereof the party shall be hanged."

"2. But although he has power to take an inquisition touching the death of a man, it must be *super visum corporis*, and not otherwise." So in *Com. Dig.* tit. "*Officer,*" "*Coroner,*" (G. 5.), headed "*Jurisdiction of the Coroner. To take an appeal, &c.,*" it is said: "He has jurisdiction with the sheriff to take an appeal of robbery, or other felony, in the same county, in the County Court: by the stat. 3 H. 7, 1." But in the subsequent article (G. 11), headed, "To take an indictment," it is stated, "That the coroner, notwithstanding *Magna Charta*, c. 17, may take an indictment upon the death of a man. 2 Inst. 32. But only upon the death of a man, not for other felony. 4 Inst. 271. And this shall be, *super visum corporis*, otherwise it is void. 4 Inst. 271. H. P. C. 170. [WIGHTMAN, J.—In *Bac. Abr.* tit. "*Coroners,*" (C), sub. fin., is this statement: "According to some opinions, a coroner *ex officio* hath no power to take an indictment, except of the death of a man." And, in the marginal note to that passage, "Without custom he hath no authority to take any inquisition other than on death."] That statement is in conformity with the other authorities which have been cited, most of which are there referred to.

(They were then stopped.)

COCKBURN, C. J.—I am of opinion that this rule must be made absolute, for that a coroner acts beyond *the proper limits of his office and jurisdiction in holding an inquest upon a fire. [*131 We have the authority of three of the very greatest expositors of the law of England, to the effect that the power of a coroner to hold inquests is limited to cases of homicide, or violent death, and that the inquest must be held *super visum corporis*. This is clearly laid down both by Lord Coke and by Lord Hale, in the plainest terms; and is

adopted by Chief Baron Comyns without the expression of the slightest doubt on the subject. In the absence of an express enactment to the contrary, these authorities are amply sufficient to show that a coroner does not possess the jurisdiction which has been contended for. Besides, there appears to have been, from the time of Edward I., certainly, if not from an earlier period, down to within the last few years, a uniform abstinence by coroners from the exercise of such a jurisdiction. Had its exercise formed part of their duties, they would surely not have allowed it thus to fall into abeyance. Independently of these considerations, the Acts of the Legislature from time to time, with reference to coroners, must be regarded as, to some extent, an exposition of the law on the subject. For instance, coroners were at first prohibited from taking fees; but in process of time, when men of lower position than had theretofore been the case, came to fill the office, the Legislature, by several statutes, commencing with stat. 3 H. 7, c. 1, provided for their remuneration by fees. In each of these statutes (a) the fees authorized to be taken are limited to cases of inquests on the view of a dead body. Hence it may be

*182] inferred that, in the opinion of the Legislature, coroners *possessed no jurisdiction to hold any other inquests: for otherwise it is reasonable to suppose that Parliament would have permitted them to take fees in cases of arson, for instance, as well as in cases of death. The only difficulty arises upon the statute *de officio coronatoris*, and the passages in Bracton and Britton which have been referred to. The statute in question says that the coroner is to go, not only to the places where any are slain, or suddenly dead or wounded, but also "where houses are broken." This might seem to imply that he is to hold inquests in cases of burglary and house-breaking. Mr. Mellish has however, I think, removed this difficulty by showing that the statute was more or less an abridgment of the common law on the subject, as propounded by Bracton; for on reference to that author we find that when he says that the coroners "*accedere debent ad domorum fractiones*" he has in his mind either a case of appeal, or the case of an inquest to be held upon the body of a man killed when the house was broken into. I think, also, that Mr. Mellish has satisfactorily explained the meaning of the statute of Marlebridge, 52 H. 3, c. 24, so far as language so obscure is capable of explanation. I do not say that the question is altogether free from difficulty; but when we find that, from the time of Edward I. to the present, the alleged jurisdiction has never been exercised; that the contemporaneous exposition of stat. 4 E. 1, stat. 2, is consistent with its non-exercise; and that great authorities, Hawkins alone excepted, are unanimously against its existence; I think that our course is clear, to the decision that the jurisdiction never did exist. I give no opinion whether or not it is desirable that coroners should have such a jurisdiction. That is a question for the Legislature, not for us, to determine.

*183] *WIGHTMAN, J.—The question before us is one of very general importance; and as I understand that it has become the practice of late years to hold inquests in like cases, and it does not appear that there has ever been an express decision on the point, I could have wished for more time to look closely into the authorities, but for the clear

(a) See these statutes enumerated in *Bac. Abr.*, tit. "*Coroners*," (G).

opinion which the Lord Chief Justice has expressed, and with which I am disposed to agree. Whatever the original jurisdiction of the coroner may have been, it was, clearly, very considerably limited by Magna Charta, c. 17, and has been, since the statute *de officio coronatoris*, confined to the matters therein mentioned; the principal of which is the holding inquests on the death of man *super visum corporis*, and the remainder of which must have reference not to inquests but to appeals. The principal ground upon which I rely is that, since that statute, there has been, till quite recently, no recorded instance of an exercise by a coroner of the jurisdiction now attempted to be established. Lord Coke, in 2 Inst. 82, where he contrasts the power of the sheriff and of the coroner, gives a precise opinion that the latter has no authority to hold any other inquest than one on a death, and that *super visum corporis*. This opinion is fortified by the very high authority of Lord Hale. It is true that there is a dictum to the contrary in Hawk. P. C., Lib. ii., c. 9, sect. 21, p. 79 (ed. 1824, by Curwood), where it is said, "This statute" *de officio coronatoris* "being wholly directory, and in affirmance of the common law, doth neither restrain the coroner from any branch of his power, nor excuse him from the execution of any part of his duty, not mentioned in it, which was incident to his office before; and from hence it follows, that though *the statute mention only his [*134 taking inquiries of the death of persons slain or drowned, or suddenly dead; yet he may and ought to inquire of the death of all persons whatsoever who die in prison, &c." Again, in sect. 85 of the same chapter, p. 88, the same author says: "It is expressly said in some books that a coroner hath no power *ex officio* to inquire of any felony, but only of the death of a man upon view. And both Staundford and Hale seem to speak doubtfully of this matter upon the authority of those books; and Sir Edward Coke seems expressly to declare his opinion, that a coroner hath no power to take an indictment in any other case. Yet since it is expressly declared by the above mentioned statute" (*de officio coronatoris*) "that a coroner ought to inquire of the breakers of houses; and it is said by Britton that he may inquire of rape, and of the breach of a prison; and such power hath never been expressly taken from him; it seems hard to say that he may not still make such inquiries, if he please." "As to the authority of 27 Ass. 55 and 35 H. 6, pl. 27 b,(a) which are cited for the maintenance of the contrary opinion, it may be answered that this point is not resolved in either of those books, but only spoken of incidentally: for the very point resolved in the Book of Assizes seems to be no more than this, that a coroner hath no power to take an indictment of an accessory after the fact; and that which is said in the Year Book of H. 6 concerning this matter, is only brought in by way of argument concerning a point of a quite different nature." These passages, however, amount to no more than an expression of opinion, based upon a comparison of the ancient authorities; [*135 which, it must be remembered, are *always obscure and often vague. The best guide to the discovery of the duties of an ancient office is custom; and in the present case the custom is opposed to the

(a) Apparently a misprint for pl. 33 [B].

existence of any such jurisdiction as that which has been claimed before us for the coroner.

(CROMPTON, J., had left the Court.)

BLACKBURN, J.—I am of the same opinion. We are called upon to prohibit the coroner from further holding this inquest; on the ground that, in holding it, he is acting beyond his jurisdiction. As to the question whether this is a case in which prohibition lies, I think it sufficiently appeared, in the course of the argument, that it is. The question, then, is, has the coroner this particular jurisdiction? It is said that he has it at common law; and that his common-law powers in this respect were left untouched by Magna Charta. Now there are two methods of showing that a jurisdiction exists at common law; namely, either by proof that it has been actually exercised, or by the citation of passages from leading authorities, decidedly asserting its existence. But in the present case not only can no instance of the exercise in fact of the jurisdiction in question be adduced, but Coke, Hale, and Comyns, following Staundford, a great authority on such a point, all agree that the coroner can hold no other inquest than that on view of a dead body. The only two recorded instances in which a coroner has exercised any other jurisdiction were, both of them, cases in the city of London; brought in the Court of the sheriff and coroner by way of appeal, and not before the coroner alone by way of inquisition.

*136] Mr. Mellish has explained *the distinction between the Court of the coroner alone and that composed of the sheriff and the coroner together. On the other hand, we find that, in a case reported in the Book of Assizes, 27 E. 3, fol. 141, pl. 55, this Court sent back an indictment forwarded to it by the coroner: giving as a reason, according to the report, that a coroner cannot hold an inquest, except on a dead body, unless by special writ directed to him for the purpose. The law is plainly laid down to the same effect in Yearb. 35 H. 6, pl. 33 [B], fol. 27. The obscure and difficult passages which have been cited to us from The Mirror, Britton, Bracton, and Fleta are not sufficient to show that a coroner ever had jurisdiction to hold an inquest on a fire. But, even if he had it at one time, the authority of Hale, Coke, and Comyns, fortified by the general custom of the office, is strong to show that it was taken away, at all events, by Magna Charta. It is true that it would not be abrogated by mere non-user; but when the non-user has prevailed for many hundred years a strong presumption is afforded thereby against the existence at any time of that which has been thus in disuse. My brother Crompton authorized me to say that, although the statute de officio coronatoris at first raised a doubt in his mind, he is satisfied with Mr. Mellish's explanation of it, and now agrees in the view which has been expressed.

COCKBURN, C. J.—If we did not state our opinion sufficiently during the argument, I wish to add that we entertain no doubt but that a prohibition may issue to a Court exercising criminal jurisdiction as well as to a civil Court.

Rule absolute.

***REGINA v. WILLIAM SEAGER WHITE and ANN FISHER.** *May 29; June 12.* [*187]

A coroner has no power, after holding an inquest *super visum corporis* and recording the verdict, to hold a second like inquest, *mero motu*, on the same body; the first not having been quashed, and no writ of *melius inquirendum* having been awarded.

C. R. KENNEDY, on May 29th, moved for and obtained a rule calling on John Birt Davies, Esq., the coroner for the borough of Birmingham, to show cause why a writ of *certiorari* should not issue to remove into this Court all inquisitions taken before him on the body of Emma Stafford.

It appeared, from the affidavits on which the rule was obtained, that there had been two inquisitions held on the body of the said Emma Stafford; and that, under the first of them, the jury found that she had died from natural causes; but, under the second, a verdict of wilful murder was returned against the defendants White and Fisher, who were committed to prison by the coroner's warrant on that charge. The rule was moved for with a view to quash this second inquisition.

Kennedy, in moving the rule, argued that, the first inquisition having been held *super visum corporis*, it was not competent to the coroner to take a second, the first remaining unquashed, and no *melius inquirendum* being awarded. And that, even if the first should be quashed, the coroner could only be empowered to take a second by the order of the Court.

He cited 2 Hale's P. C. pp. 58, 59 (ed. 1800, by Dogherty): "If the coroner take an inquisition without view of the body, he may take a second inquisition *super visum corporis*, and that second inquisition is good for the first was absolutely void: 2 R. 3, 2, 21 E. *4, 70. But if a coroner takes an inquisition *super visum corporis*, and after this another coroner takes an inquisition [*188 upon the same matter, the second inquisition is void, because the first was well taken: M. 6 R. 2; Coron. 107; Crompt. Justic. 229 b. If a coroner takes an inquisition *super visum corporis* (as upon a *felo de se*), and that is sent into the King's Bench and quashed, the coroner may take a new inquisition *super visum corporis*." Also *Umfreville's Lex Coronatoria*, p. 136 (ed. 1822, by Grindon) (p. 220 of original edition of 1761); in which the case of the two inquests on Serjeant Jenney's servant, reported in Yearb. 2 R. 3, fol. 2, pl. 5, and referred to in the above extract from Hale, is cited at length. And Hawk. P. C. Lib. II., c. 9, s. 23 (vol. 2, p. 80, of Curwood's edition), in which the same case is thus spoken of. "It hath been resolved, that a coroner may lawfully within convenient time, as the space of fourteen days after the death, take up a dead body out of the grave in order to view it, not only for the taking of an inquest, where none hath been taken before, but also for the taking of a good one, where an insufficient one hath been taken before." Also, Anonymous, 1 Strange 532, where "The Court granted a rule for the coroner in Wenlock in com' Salop to take up a body in order for a new inquisition, the former having been quashed." And *Rex v. Saunders*, 1 Strange 167, where "Yorke moved for leave for the coroner to take

up the body, and take a new inquisition according to 2 Sid. 101,(a) Salk. 377,(b) which was granted; and it was said, the coroner could not do it without leave of the Court."

Rule nisi.

*139] It appeared, from the affidavits filed on showing cause against the rule, that the coroner had held an inquest on view of the body of Emma Stafford on 17th May in the present year, at which a verdict of "Died by the visitation of God" was recorded. On 18th May, before the body was buried, he received further information, upon the receipt of which he deemed it his duty to hold a second inquest, being of opinion that there was occasion for further inquiry; and, thinking it expedient for the furtherance of justice that the second inquest should be held before the marks, if any, on the body were effaced by decomposition, he held a second inquest on the body on 21st May, at which a verdict of wilful murder was found against White, as principal, and Fisher, as accessary before the fact. The coroner also made the following affidavit. "In deciding to hold the second inquest, I was partly guided by the following precedents: Regina v. Thomas Jennings, for the murder of Eleazer Jennings, wherein a second inquest was held, the first being unquashed, and the prisoner was convicted (and afterwards executed) for murder, at the Berks Lent Assizes, 1845. At the Warwick Lent Assizes, 1846, Mary Marsh, who had been committed for murder by me upon a second inquisition, the first being unquashed, was tried for that offence, and the presiding Judge, Coltman, J., did not express any disapproval of the holding the second inquest, although counsel for the prisoner had strongly drawn attention to the inquest being a second, and opposed to the first in its finding: but the prisoner was acquitted on other grounds. There was a similar contrariety of verdicts in the case of Thomas Jennings."

*140] *Field* now showed cause.—The question is, whether a coroner, after he has held an inquest super visum corporis and the jury have returned a verdict, can hold a second inquest before a fresh jury.(c) In favour of his jurisdiction to do so is the following passage in Britton, cap. 1, pl. (7), fol. 4 (ed. 1640, by Wingate): "Et si le coroner de la premiere enquete eyt suspecion de concelement de la verité ou que mestre soit de plus enquerre et par autres, si enquerge plusours foitz. Mes pour nule contrarieté de verdit ne change ne amenuse son enrroulement en nul point." Which passage is thus rendered in Kelham's translation, p. 14 (ed. 1762). "And if the coroner on the first inquiry suspect concealment of the truth, or that there may be occasion for a further inquiry, and that by others, let inquiry be made again and again; but let him not on account of any contrariety in the verdicts, change or alter his inrollment in any point." Kelham adds, in a note: "By others, i. e., by other evidence, not by other jurors"; and refers to Umfreville's note on this passage, in his *Lex coronatoria* (Introduction), p. xlv.(d) At the place referred to, Umfreville translates the passage in Britton thus: "And if the

(a) *Barclay's Case*.

(b) *Regina v. Clerk*, 1 Salk. 377.

(c) That the jury on the second inquest was a fresh one did not appear on the affidavits, but was admitted by counsel.

(d) See the original edition of Umfreville, 1761. Grindon (ed. 1822) omits this note.

coroner upon the first inquiry shall suspect the truth to be concealed, or that it be necessary to make further inquiry, and by others, let his inquiry be often, but in no point to change or alter his inrolment, upon account of any contrariety in the verdicts." And the note thereon is as follows: "This paragraph is darkly expressed by Britton, and requires some *explanation; though it may be rather of speculation and curiosity than use. The seeming difficulty is how to understand the author's meaning, when he tells us, the further inquiry is to be 'par autres,' whether by other *jurors*, or by other *evidence*. From the conclusion of the paragraph which directs the coroner in no point to alter his record, by reason of any contrariety in the verdict, it might *prima facie* be conceived, that the coroner might summon other *jurors*, to inquire, &c., which might cause *contradictory verdicts*. But the fact is not so, nor could the coroner summon a second jury; nor is the word *verdict* here made use of to be understood of the ultimate finding of the jury, but only of the separate opinion of the several *villes* summoned to inquire, which often made further evidence necessary, and caused adjournments. When the ultimate finding was to be received, and all could not agree, the *villes* were then to be separately examined, and were separately required to give their opinion; and the judgment of each *vill* was then separately to be recorded by the coroner, as the "*dicta utriusque partis*," but the compleat verdict, or effective finding, was to be collected "*ex dicto majoris partis juratorum*," from the majority of the *jurors* agreeing one way: "*et standum est dicto majoris partis juratorum*," was then record-reasoning; and distinctly to specify and record the "*dicta utriusque partis*," was then the customary usage. And this seems explained by the *Mirror*, c. 1, § 13, and confirmed by the curious records communicated in the notes ad 2 Hale P. C. 297. Vid. *Brit.* 12 b. This further inquiry, therefore, is to be understood as by other *evidence*; and not by other *jurors*." Kelham and Umfreville, however, misunderstood Britton's language. In support of his *construction of it, Kelham refers, in the margin, to the same passage in the *Mirror* (c. 1, § 13); which, however, contains nothing bearing on the question; and also to *Fleta*, p. 37, § 3 (ed. by Selden), which is as follows: "*Et facta inquisitione semel vel pluries, quotquot indictaverint, statim capiantur si inveniri possunt, augere enim poterit quilibet coronator suas irrotationes, minuere autem nequaquam.*" This passage is against Umfreville's construction of Britton; for by an "inquisition taken once or several times" *Fleta* must mean several inquisitions, not several adjournments of one inquisition. [CROMPTON, J.—If the coroner has jurisdiction, *mero motu*, to hold a second inquest, what necessity is there for an application for a *melius inquirendum* in any case?] The object of that writ was to insure a full inquiry in cases where the coroner *malè se gessit*. It ordinarily went to the sheriff, not, except by leave of the Court, to the coroner. The passage cited by the other side, on moving for the rule, from 2 Hale, P. C., pp. 58, 59, does not go to the extent of laying down that in no case can a coroner take a second inquest, unless the first was taken without a view of the body. Supposing, however, that such was Hale's opinion, the case of the double inquest on Serjeant Jenney's servant, which he cites in support of it, does not bear

him out. There are two reports of that case (Yearb. 2 Ric. 3, fol. 2, and Yearb. 21 Edw. 4, fol. 70); and there is nothing in either of them to show that the first inquest was not *super visum corporis*. On the contrary, the report in Yearb. 2 Ric. 3, fol. 2, which is as follows, states that it was so. 'Anno vicesimo E. 4, quidam serviens Will' Jenney servientis ad legem, interfectus fuit per quendam R. Petit in *143] Com. Suff., et *postea *super visum corporis* idem R. Petit indictus fuit coram coronatore, per nomen R. Petit de tali villâ vagabund', ut principalis murdrator cum aliis accessoriis, et postea coronator præceperit corpus interfecti sepeliri. Et postea idem Will' Jenney videns illud indictamentum insufficiens fieri, fecit dictum coronatorem et alios coronatores ejusdem comitatus iterum effodire extra terram interfectum xiv. dies sepultum, et indictaverunt iterum eundem R. Petit sufficienter cum aliis accessoriis, videlicet W. Wingfeld' armig. et alios, (a) et super hoc gravis clamor venit ad regem et quod esset contra legem, et propter hoc omnes justitiiarii associati in camerâ scaccarii concordaverunt quod coronatores benè fecerunt." There is nothing in Yearb. 21 Edw. 4, 70, inconsistent with this statement of the facts. So far, therefore, from the case supporting the opinion attributed by the other side to Hale, it is a direct authority the other way. [CROMPTON, J.—It appears from the report that the first inquest was insufficient; and that inquest must have been void in point of form at least. Possibly the inquisition did not purport on its face to be drawn up *super visum corporis*. COCKBURN, C. J.—If two inquests may be held and two conflicting verdicts returned, what is to determine which of the two findings is to be tried at the Assizes?] The last in point of time should be tried; as was done in the case in the Yearbooks. Lastly, assuming that the second inquest ought not to have been held, having been held it is valid. In *Rex v. Bonny, Carth. 72*, the Court refused to disturb a second inquest taken upon view of a body which was disinterred for the purpose after having *144] been buried more than a year; a previous inquest upon *it having been then quashed. Upon a motion being made, after the second inquest, and more than two years from the death, for a melius inquirendum, the Court said that although that proceeding, rather than a second inquest, would have been proper, considering the length of time that the body had been buried, yet factum valet quod fieri non debet. [COCKBURN, C. J.—I am disposed to think that, in the case cited from the Yearbooks, the first indictment had been quashed before the second inquest was held.] There is no trace of that in the reports. No Court appears to have interfered; but Serjeant Jenney was the only person who procured the coroners to hold the second inquest. In the present case the coroner is simply desirous of doing what the Court thinks right. It must be admitted there is no decision upon the subject except that which has been cited; nor have any precedents but those mentioned in the coroner's affidavit been discovered.

C. R. Kennedy, in support of the rule, was not called upon.

COCKBURN, C. J.—We are all of opinion that this rule must be made absolute. We have the authority of Lord Hale and the uniform course of practice in support of the proposition, that a coroner

(a) Sic.

cannot hold a second inquest while the first is existing. If the coroner were allowed, *mero motu*, to hold two inquests, the greatest inconvenience might arise from the inconsistent findings of the respective juries. In holding an inquest, the coroner performs a judicial duty, and he is *functus officio* as soon as the verdict has been returned. He can hold no second inquest in the same case, unless *the first has been quashed by this Court; nor can he inquire any [*145 further unless a *melius inquirendum* has been awarded.

WIGHTMAN, CROMPTON, and BLACKBURN, J^a, concurred.

Rule absolute.(a)

(a) The rule was drawn up for a *certiorari* to bring up the inquisition of 21st May; and, by consent, that the said inquisition, when returned, be quashed.

END OF TRINITY TERM.\

CASES

ARGUED AND DETERMINED

IN

Trinity Vacation,

XXIII. & XXIV. VICT. 1860.

The Judges of the Court of Queen's Bench who sat in Banc in this Vacation, were,—

WIGHTMAN, J.
CROMPTON, J.

HILL, J.
BLACKBURN, J.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

The QUEEN, on the prosecution of HANS RINGLAND, *v.* The
BURSLEM LOCAL BOARD OF HEALTH. *June 14.*

[Reported, 1 E. & E. 1088 (E. C. L. R. vol. 102).]

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

PERRINS *v.* The MARINE AND GENERAL TRAVELLERS'
Insurance Company. *June 14.*

[Reported, 2 E. & E. 324 (E. C. L. R. vol. 105).]

*IN THE EXCHEQUER CHAMBER.

[*147]

(Error from the Queen's Bench.)

JOHN CLARK *v.* The QUEEN. *June 14.*

The Court has power to change the venue in an information in the nature of a quo warranto: and a suggestion on the record, that the trial of the issue can be more conveniently had in the county of the substituted venue, shows sufficient ground for the change, and for the subsequent proceedings in that county.

ERROR by the defendant to reverse the judgment against him on an information in the nature of a writ of quo warranto. The venue in the margin of the information was South Lancashire; and the information called upon the defendant to show by what authority he claimed to exercise the office of councillor of one of the wards of the borough of Liverpool. The defendant traversed that he exercised the office of councillor, or claimed to be councillor. Issue was joined thereon. Then followed on the record a suggestion by the Court of Queen's Bench that the trial of the above issue could be more conveniently had in the county of Middlesex, and therefore, according to the statute in such case made and provided, that a jury of the said county of Middlesex, &c. The record, further, showed that the case was tried in Middlesex by a jury of that county, who found the defendant guilty, and judgment of ouster was accordingly entered. Error was assigned, on the ground that the case was tried before a Middlesex jury, and not before a jury of the county or place where the venue was laid; and that no law warranted the trial of the issue by such a jury, on the suggestion that the trial could be more conveniently had in Middlesex than in Lancashire.

**Brett*, for the defendant.(a)—There has been a mistrial. [*148] The venue was local, and the Court below had no power to change it to Middlesex on the mere suggestion that the trial could be more conveniently had there; though possibly, had the suggestion been that a fair trial could not be had in South Lancashire, the venue might have been changed. A proceeding by quo warranto is not an "action" within the purview of stat. 3 & 4 W. 4, c. 42, s. 22, which empowers the Court to change the venue in local actions: and stat. 6 & 7 Vict. c. 89, under sect. 5 of which the Court may order the venue in proceedings by way of quo warranto to be laid in Middlesex in the first instance, contains no provision for the change to that county of a venue originally laid elsewhere. The case, therefore, falls within the old statute of quo warranto, 18 Edw. 1, stat. 2, by sect. 2 of which the venue must be local and the case tried in its own shire. [*WILLIAMS, J.*—The old writ of quo warranto is now obsolete. Although that is so, it is laid down in *Corner's Crown Practice*, p. 179, that the same incidents apply to the substituted proceeding by information in the nature of a quo warranto.

Milward, *contra*, was not called upon.

WILLIAMS, J.—We think that the Court of Queen's Bench had power to change the venue, and that there has been no mistrial.

WILLES and *BYLES, Js.*, and *MARTIN* and *CHANNELL, Bs.*, concurred.

Judgment affirmed.

(a) Before *Williams, Willes and Byles, Js.*; *Martin and Channell, Bs.*

*149] *HODGSON and Others v. HOOPER and Others. *April 24; May 4; June 14.*

On 21st August, 1781, the lord of a manor, with the consent of certain of the tenants, granted to five persons, two of whom were the churchwardens and overseers of the parish of M., license to enclose 3a. 2r. of the waste of the manor; and that they and their heirs, and all persons claiming under them, should and might lawfully hold the same, so enclosed, in trust for the purpose of building a workhouse for the poor of M.; rendering to the then lord and to all other lords of the manor the yearly rent of 5s. for the same in every year for ever. This grant was not according to any custom in the manor, nor was there any such custom. The churchwardens and overseers of M. immediately took possession of the land the subject of the grant, and built on it a workhouse which, up to Midsummer, 1838, was used as such; and possession of the workhouse and land was retained by the churchwardens and overseers, or persons claiming through them, from 1781 to 1840, when they were surrendered to the then lord of the manor, as hereafter mentioned. In 1817, the churchwardens and overseers of M. also took possession of 2r. 10p. of land, contiguous to that granted in 1781; and retained possession of this additional land also from 1817 to 1840. The five persons nominated as trustees of the original land by the grant of 1781 all died before 1817, and no heir of the survivor came in to claim admittance to it, after due proclamations in the manor Court calling upon him to do so. In October, 1835, the then steward of the manor gave notice to the churchwardens of M. to nominate other trustees in the stead of those deceased, in order to their admittance at the next manor Court, to save a forfeiture. In compliance, the vestry of the parish nominated seven fresh trustees, who, on 27th October, 1835, were admitted to both pieces of land at a manor Court; the parish paying a fine to the lord and the lord granting the land to the seven persons and their heirs, to hold by copy of court roll and at the will of the lord, on the same trusts as in the grant of 1781, and at the same yearly rent of 5s. From the accounts of a deceased steward of the manor, it appeared that this rent was paid to the lord from 1781 to 1791, and from the parish books of M. it appeared that it was also paid from 1825 to 1836. In January, 1840, the vestry of M. passed a resolution that, there being no further use for the premises as a workhouse, the land should be forthwith surrendered to the then lord of the manor by the churchwardens and overseers, and the trustees appointed in 1835. And in February, 1840, that surrender was made to the then lord of the manor, the surrender comprising, in terms, the first piece of land only, but possession being given to the lord, not of it only, but also of the other. The lord, by himself or by persons claiming under him, held undisturbed possession of both pieces of land from February, 1840, to the time of the present action.

On a case stated, in an action of ejectment brought, on 16th February, 1859, by the churchwardens and overseers of M., to recover both pieces of land from defendants, who were in possession and claimed under the lord of the manor of 1840, power being reserved to the Court to draw inferences of fact: Held, that plaintiffs were not entitled to recover either piece of land. As to the original piece, that the possession by plaintiffs under the grant of 1781 was at the outset permissive, and had not, down to and at the time of the passing of stat. 3 & 4 W. 4, c. 27 (July, 1833), become adverse; plaintiffs having, from 1781 down to that time, held either as tenants at will or, at most, as tenants from year to year of the lord. That such tenancy was determined by the admittance of the fresh trustees for M. in October, 1835, whereby, within five years from the passing of stat. 3 & 4 W. 4, c. 27, a fresh tenancy at will was created; which last tenancy was, within twenty-one years of its inception, namely, in 1840, determined by the lord's entry and resumption of possession. As to the piece of land taken possession of by plaintiffs in 1817: That the lord's right of entry to it could not be barred before 1837, before which, namely, in 1835, it was included in the land to which the fresh trustees were admitted; as it was, in 1840, in the land of which the lord retook possession.

EJECTMENT brought, by writ dated 16th February, 1859, by the
*150] plaintiffs, the churchwardens and *overseers of the parish of Mitcham, for the recovery from the defendants of a piece of land containing four acres and ten perches, or thereabouts, situate in that parish, on the north side of Mitcham Common; together with the messuage or tenement and the out-offices and buildings thereon, lately erected as a workhouse for the poor of the said parish of Mitcham, and for a garden or orchard for the further accommodation of the said poor, and such other buildings as are now standing

thereon, and which premises are now used as an india-rubber manufactory, with the appurtenances.

The following case was afterwards stated by consent.

1. There are either appendant to, or forming part of, or included in, the manor of Biggin and Tamworth, in the county of Surrey, large commons, or commonable waste lands, of which the premises sought to be recovered formed part prior to 1781.

2. On 21st August, 1781, the lady of the manor, of Biggin and Tamworth, by the consent in writing of eighteen persons, tenants of the manor, granted unto Foster Reynolds, John Swain, John Chesterman, Joseph Sibley and James Galpin, license to enclose a piece of land, parcel of the common or waste belonging to the said manor, called Mitcham Common, containing three acres and two roods (being part of the land sought to be recovered), as the same were then staked out; and that they and their heirs, and all persons claiming under them, should and might lawfully hold the same, so enclosed, in trust for the purpose of erecting and building a workhouse for the poor of the said parish of Mitcham, and for a garden and orchard for the further accommodation and benefit of the said poor; rendering to the lady of the said manor, and all other lords or ladies, *lord or lady, of the said manor, the yearly rent of 5s. for the same in [*151 every year forever. The consent and grant are entered on the court rolls of the manor, but the grant was not according to any custom of the manor; and there never was any custom of the manor for the lord or lady of the manor to grant, alien, or convey any part of the common or waste lands of or belonging to the manor, in the manner in which the waste land comprised in the grant of 21st August, 1781, was, or purported to be, granted or conveyed.

3. John Chesterman and Joseph Sibley were the then churchwardens and overseers of the parish.

4. The churchwardens and overseers of the parish, from 1781, entered into possession of the land and premises; and a poor-house or workhouse was duly erected at the expense of the parish upon the piece of land, and the workhouse and land were thenceforth used, and possession thereof had, by the churchwardens and overseers of the parish, for the accommodation and benefit of the poor thereof, until 1838.

5. Up to and including the year 1836, the workhouse was used by the churchwardens and overseers of the parish of Mitcham. Subsequently to the year 1836, and by virtue of the Poor Law Acts, the parish of Mitcham was included with other parishes in the Croydon Union, and the workhouse was from time to time used by the guardians of the Croydon Union, constituted under the said Acts, for the reception of the poor of the parish of Mitcham, until Midsummer, 1838. The guardians of the poor of the said Union paid to the churchwardens and overseers of Mitcham the annual rent of 105*l.*, in respect of such workhouse, up to Midsummer, 1838, and up to that time the churchwardens and overseers kept the workhouse in repair, and disposed of the fruit or *produce of the garden and orchard, and annually [*152 accounted to the vestry of the parish in respect of the rent and produce. In the year 1838, the use of the workhouse as a workhouse was abandoned, but the churchwardens and overseers of the

said parish retained possession of the land and premises, sold the produce of the land, and accounted for the sums realized by such sale in their accounts as such churchwardens and overseers, until February, 1840.

6. In the year 1817, the churchwardens and overseers of the said parish took possession of two roods ten perches of land, parcel of the said Mitcham Common (the remaining portion of the land sought to be recovered), and enclosed the same, and held possession of and used and enjoyed the same, with the residue, for the benefit of the poor, until 1838; and from thence till February, 1840, they sold the produce thereof, and applied the proceeds, in manner mentioned with respect to the residue of the land.

7. Previously to 6th August, 1817, all the persons originally nominated trustees of the said piece of ground and premises, containing three acres and two roods, had died; and it appears on the rolls of the manor that the homage presented to a court baron, holden on 21st May, 1834, the deaths of the said trustees, and that it was not known who was the survivor or the heir of the survivor; and there is also an entry on the court rolls, and the fact is, that thereupon three several proclamations were made, according to the custom of the manor, for the heir of the surviving trustee, or any other person claiming title to the said premises, to come in and be admitted; and that the last of such proclamations was made on 27th October, 1835; and that, default having been made, the bailiff of the manor was *153] ordered to *seize the land as forfeited to the lord. Such proclamations and default were duly enrolled.

8. On 10th October, 1835, the steward of the manor wrote and sent the following letter to the churchwardens of Mitcham.

“6 Harper Street, Red Lion Square,
10th October, 1835.

“Gentlemen,

“I beg to inform you that a general court baron for the manor of Biggin and Tamworth will be held at the Swan Inn, Mitcham, on Tuesday, the 27th instant, at 12 o'clock at noon; and as all the gentlemen who were admitted tenants of the manor for the land upon which the workhouse is erected are dead, it is necessary the parish should nominate others in their stead, in order that they may be admitted at the next court, to save a forfeiture of the estate. I shall therefore be obliged by hearing from you upon the subject at your earliest convenience.

“I am, &c.,

“J. E. PENFOLD,

“To the Churchwardens,

“Mitcham, Surrey.”

“Steward.”

9. In the parish books of Mitcham there is an entry, dated 22d October, 1835, to the following effect: “At a vestry held this day, pursuant to public notice given in the church on Sunday last, for taking into consideration a notice received by the churchwardens from the steward of the manor of Biggin and Tamworth, to nominate tenants for the land on which the workhouse is erected, in the stead of those who are deceased, and other business; Resolved, ‘That the following

eight gentlemen, being nominated, be requested to take upon themselves *the execution of the trust, with the understanding [*154 that the expenses consequent thereon should be paid by the overseers of the poor of this parish.”

10. The overseers of the parish paid to the then lord of the manor, or his steward, the sum of 79*l.* 17*s.* 6*d.*, as and by way of fine in respect of the admission of seven of the above mentioned eight persons (the vicar not being admitted); and there is on the rolls of the manor an entry, that at a special court baron, holden on 27th October, 1835, after reciting the grant of 21st August, 1781, and that the said Foster Reynolds and the four other persons enclosed the piece of land whereon the churchwardens and overseers erected the workhouse, and converted the remainder into a garden and orchard as aforesaid; and after reciting the proclamations and forfeiture, and that the lord had remitted the escheats and forfeiture; the lord granted to the said seven persons the said piece of land and premises, to hold unto them and the survivor and survivors of them, and the heirs and assigns of such survivor, of the lord of the manor, by the rod, and by copy of court roll, at the will of the lord, according to the custom of the manor, in trust for the inhabitants of the parish of Mitcham, and to be surrendered and disposed of as they should, from time to time, in public vestry assembled, or otherwise, direct or appoint, so as the aforesaid customary hereditaments and premises should be for ever thereafter used as a workhouse for the poor of the parish of Mitcham, and for no other purpose; yielding and paying the rent of 5*s.* a year, and a heriot, on the death of every tenant, of 2*l.* 2*s.*, and a fine at will on the death or alienation of a tenant; and doing fealty, suit of court, and performing such other services as the customary tenants of the manor *do or ought to perform. And such seven persons [*155 were then admitted tenants in manner and form aforesaid, and the fine for their admission was set at 79*l.* 17*s.* 6*d.*, and their fealty was respited.

11. It appears, from the accounts of a deceased steward of the manor, that the yearly rent of 5*s.*, reserved by the grant of 21st August, 1781, was paid to the lord from 1781 to 1791, and, from the books of the churchwardens and overseers of the parish, that it was paid to the lord from the year 1825 to 25th March, 1836.

12. The guardians of the poor of the Croydon Union, on 8th May, 1838, sent to the churchwardens and overseers of Mitcham a notice in writing, under their common seal, of their intention to deliver up to them, on the 24th June then next, possession of the workhouse and gardens, land and appurtenances thereto belonging, which they then held of them. The workhouse was, at the same time, abandoned by the guardians, and possession thereof was delivered up to the churchwardens and overseers of Mitcham.

13. At a meeting of the vestry of the parish of Mitcham, held on 23d January, 1840, a resolution was passed for surrendering the said piece of ground and the workhouse and premises which had been erected thereon by the parish, into the hands of the then lord of the manor; which resolution was to the following tenor and effect. “At a vestry, assembled under public notice given as the law requires for that purpose, to take into consideration the expediency of surrendering and

disposing of the premises on Mitcham Common, lately used as and for the workhouse of this parish, and to give directions to the churchwardens and overseers of the poor, and the trustees, and all other persons in whom

*156] "such premises are now vested, to surrender and dispose of the same accordingly, Edward Walmsley, Esq., churchwarden, in the chair; present, Messrs. James Bridger, churchwarden" (now lord of the manor and one of the now defendants), "John Glover and John Searle, overseers, John Holden and Charles Aspery, guardians, and" nineteen other vestrymen: "Whereas, it appearing to this vestry that the guardians of the Croydon Union have, ever since midsummer, 1838, formally abandoned and delivered up possession to the churchwardens and overseers of the poor of this parish the premises on Mitcham Common, which had been for many years and up to that period used as a workhouse for the poor of this parish, and that such premises are now no longer used or required as such workhouse; and it appearing also to this vestry that the parish has ever since sustained a considerable annual expense by keeping a proper person to protect the said premises; and it further appearing to this vestry that the purpose and object for which the said premises were granted to certain trustees for the benefit of the parish by the lord of the manor, of whom such premises were holden, have now ceased, and that such trustees are liable to pay to the lord of the manor a yearly quit rent, and to keep the premises in repair; It is unanimously resolved and agreed, that it is expedient and for the benefit of this parish that the hereditaments and premises heretofore used as a workhouse for the poor of this parish be surrendered to the lord of the manor of whom the same are holden, by the churchwardens and overseers of the poor, and by the trustees of the same, and by all such other persons as may be considered necessary to effect a legal

*157] surrender of the said premises. And this vestry do *hereby accordingly authorize and empower, direct and appoint, the churchwardens and overseers of this parish and the seven persons" (naming them) "to whom the said premises were granted in trust for the inhabitants of this parish, and to be surrendered and disposed of as they should from time to time, in public vestry assembled, or otherwise, legally direct and appoint, so as the said premises should be for ever after used as a workhouse for the poor of this parish, and for no other purpose, to surrender the same premises into the hands of the lord of the manor in such way as may be considered necessary, in order to relieve this parish and the trustees from all further expense and liability."

14. A copy of this resolution was forwarded to James Moore, Esq., the then lord of the manor, with a letter expressing the readiness of the parish officers to "execute it."

15. It appears, by an entry on the court roll, that, in pursuance of the resolution, the then trustees of the piece of land, workhouse and premises, and the churchwardens and overseers of the parish, surrendered the same into the hands of the lord, according to the custom of the manor; and by a surrender-note under seal, taken out of court by the steward of the manor, on 16th February, 1840, and signed by the trustees, therein described as customary tenants of the manor, and by the overseers and churchwardens, described as such, those

parties, in pursuance of the direction of the vestry meeting of the inhabitants of the parish of Mitcham, contained in the above resolution, surrendered by the rod into the hands of the lord, according to the custom of the manor, the said piece or parcel of customary land, containing 3 a. 2 r., together with the messuage or premises for *many years and until then lately used as a workhouse, &c., [*158 to which said customary hereditaments the said trustees were admitted tenants at the said special court baron holden on 27th October, 1835; to the intent that the lord might do therewith his will.

16. The Poor Law Board, for the time being, were no parties to these surrenders, or either of them. According to the course of business of the Poor Law Board, if any application for their consent to or with respect to such surrenders had been made to them, such application and the consent thereto, if any, would have been entered on the register for the time being of their correspondence, which register is now in existence. On searching such register it is found that no such application or consent is contained therein, nor is there any trace among the documents of the Poor Law Board of such application having been made or consent given.

17. Immediately after the aforesaid surrender of the 3 a. 2 r. had been made, and on the same 18th February, 1840, one churchwarden and one overseer of the poor of the parish accompanied the bailiff of the manor on to the said 2 r. 10 p., and delivered up the possession thereof to the bailiff. One churchwarden and one overseer were appointed and delegated by the two churchwardens and three overseers of the poor of the said parish to deliver up possession as aforesaid, as their joint act and on their behalf, and such possession was so delivered up accordingly.

18. James Moore, as the lord of the said manor, thereupon entered into and took possession of all the lands and premises, containing 4 a. 0 r. 10 p. James Moore was, and continued to be, from the year 1803 up to the time of his death, which happened in February, 1851, *the lord of the manor; and the defendant James Bridger [*159 became lord of the manor in 1857.

19. The defendants claim all and every the said lands through the said James Moore.

20. The license of 21st August, 1781, and the grant of 27th October, 1835, were neither of them executed in the presence of two or more credible witnesses, or enrolled in the High Court of Chancery within six calendar months after the execution thereof, and the license was not made for a full and valuable consideration actually paid at or before the making of such license. The said 2 r. 10 p. of waste land was not, nor was any part thereof, assured by deed, executed in the presence of two or more credible witnesses, and enrolled in the High Court of Chancery.

The questions for the opinion of the Court were, First; whether, at the time of the surrender, in February, 1840, the churchwardens and overseers of Mitcham had any and what estate or interest in the premises, or any part thereof. Secondly; whether, at the commencement of this action, the churchwardens and overseers were entitled to the possession of the land and premises, or any part thereof, on behalf of the parish.

If the answer to the two questions were in the affirmative, in respect of any part thereof, then judgment was to be entered for the plaintiffs for so much. If, in the negative, then judgment was to be entered for the defendants.

The Court was to be at liberty to draw such inferences from the facts stated as a jury might have drawn.

Lush, for the plaintiffs.—In July, 1833, when stat. 3 & 4 *160] *W. 4, c. 27, was passed, the possession by the parish officers of Mitcham of the lands and premises in dispute was adverse, and had been so for more than the twenty years immediately preceding; they therefore, by reason of that statute, then acquired the fee, and nothing has since taken place to divest them of their freehold estate. The grant by the lady of the manor, in 1781, of the license to enclose part of the waste, in consideration of an annual payment of 5s. by the licensees, was in effect a grant of the fee; the 5s. being reserved as a quit rent, according to the ancient practice upon grants of freeholds by lords of manors, not as a rent service, which of course could not be reserved upon the grant of a fee. Although, strictly speaking, a fee could not pass by grant, but only by a feoffment, or by deeds of lease and release, the Court is at liberty at this distance of time to presume that there was such a proceeding as would pass the fee and thus effectuate the intention of the parties. [BLACKBURN, J.—What was their intention? May it not have been to make the land a copyhold?] That cannot have been meant; for it does not appear that the licensees were to hold the land at the will of the lord, or according to the custom of the manor; or that there was any custom in the manor for the lord to grant parcels of the waste as copyhold; or that the licensees were admitted in the manor Court, or paid any fine. All the incidents of copyhold tenure were therefore wanting. On the contrary, the limitation in the grant to the licensees and their heirs, in consideration of the annual payment of 5s. to the lord for ever, shows an intention that the licensees should have the land for ever, and the lord the rent. [BLACKBURN, J.—The grant expresses that *161] the rent is to be annexed to the lordship of the manor; this would evidence an intention, which, however, could not be legally carried out, to create a perpetual tenure of the land by the licensees from the lord. COCKBURN, C. J.—How can there be an adverse holding of land for which the holder pays a rent?] The holding would, certainly, not be adverse, if the rent was paid as a rent-service or an acknowledgment of tenure; but, here, it was not so. It appears from the grant that the lady of the manor retained no reversion; but, as is said by Littleton, sect. 215 (Co. Litt. 142, b), "Where a man upon" "a gift or lease will reserve to him a rent-service, it behoveth, that the reversion of the lands and tenements be in the donor or lessor." The licensees were to hold the land, not as tenants, but as owners. Their possession was therefore adverse, within the rules laid down in the notes to *Nepean v. Doe*, 2 Smith's L. C. p. 579, ed. 5, as follows: "Whenever the question arose" (i. e., before stat. 3 & 4 W. 4, c. 27) "whether a particular claimant was barred by having been twenty years out of possession, the mode of solving this question was by considering whether he had been out of possession under such circumstances as had reduced his interest to a right of entry;

for, if he had, then, as that right of entry would be barred by stat. 21 Jac. 1, c. 16, at the end of twenty years, the possession during the intermediate time was adverse to him. Now, in order to determine whether the claimant had been out of possession under circumstances which would turn his estate to a right of entry, it was necessary to inquire in what manner the person who had been in the possession during that time held. See *Reading v. Royston*, Salk. 423. If he held in a *character incompatible with the idea that the freehold remained vested in the claimant, then, as the case would arrange [*162 itself under some one of the heads *disseisin*, *abatement*, *discontinuance*, *deforcement*, or *intrusion*, all of which expressed at common law different modes of substituting a freeholder by wrong for one by right, so as to make the new comer tenant to the lord and to a stranger's *præcipe*, see 1 Roll. 659, &c.; Co. Litt. 277," "it followed that the possession in such character was *adverse*. But it was otherwise if he held in a character compatible with the claimant's title. And, in order to ascertain in what character the person in possession held, the Court would look at his conduct while in possession." "It is therefore apprehended that at the time of the enactment of 3 & 4 W. 4, c. 27, the question whether possession was or was not adverse, was to be decided by inquiry whether the circumstances of that possession were sufficient to evince its incompatibility with a freehold in the claimant." The question in the present case, therefore, is, whether or not the parish officers representing the licensees under the grant of 1781, held in a character compatible with the defendant's title. And they clearly did not; for, whether or not that grant was effectual to pass the fee, the intention was that the fee should pass by it, and the yearly payment of 5s. must be taken to have been made with reference to this intention, not as a rent-service, but as a rent-seck. [COCKBURN, C. J. —Suppose that the intention was to convey the fee, but that the deed of grant was insufficient to pass the fee. Would not the result be that the grantees became tenants at will?] No. *Taylor v. Horde*, 1 Burr. 60, shows that *after twenty years' possession they would gain [*163 a title. In the same way, a tenant, who enters under a void lease which passes no interest to him, gains a title to the fee, after twenty years' possession without payment of rent: *Doe d. Lansdell v. Gower*, 17 Q. B. 589 (E. C. L. R. vol. 79). And possession, gained without committing a disseisin, begins to be adverse as soon as the person so in possession ceases to have a right to the possession: *Doe d. Parker v. Gregory*, 2 A. & E. 14 (E. C. L. R. vol. 29). If, therefore, the grant in the present case in 1781 passed no title, possession under it for twenty years from that date was adverse, and has now given the plaintiffs a title to the fee, by reason of stat. 3 & 4 W. 4, c. 27, ss. 2 and 3. Assuming, however, that the plaintiffs, at the time that Act passed, were in possession merely as tenants at will, sects. 7 and 15 show that the lord was, in that case, bound to enter or bring his action within five years from that period. Sect. 7, which is clearly retrospective, enacts, "That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent shall be deemed to have

first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined." And sect. 15, "That when no acknowledgment" of the title of the person entitled to land or rent, "shall have been given before the passing of this Act, and the possession or receipt of the profits of the *164] land, or the receipt of the *rent, shall not at the time of the passing of this Act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress or bring an action to recover such land or interest at any time within five years next after the passing of this Act." The lord of the manor having failed to enter or bring an action within five years from July, 1838, when the Act passed, the plaintiff's title became indefeasible at the end of that period: *Doe d. Dayman v. Moore*, 9 Q. B. 555 (E. C. L. R. vol. 58). Assuming that the admittance by the lord, in October, 1835, of the nominees of the parish, under the mistaken impression on both sides that the land was copyhold, was a determination of the tenancy at will, that was not sufficient of itself to give the lord a title; he ought to have made an entry or brought an action within the five years next after July, 1833. As he did not do so, the plaintiffs, in any view of the case, acquired a freehold title in July, 1838, which could not be divested by the surrender in 1840 to the lord. Whether, therefore, the plaintiffs, in 1833, had acquired the fee by adverse possession, or were then tenants at will of the lord, they are entitled to the judgment of the Court.

Bovill, contra.—First: This action was brought in 1859, and for more than the twenty years last immediately preceding, namely, from the year 1835, the lord of the manor has been in undisputed possession of the premises. In that year, at all events, if not *before, *165] the nominees of the parish became either tenants to the lord or grantees of a copyhold estate, which they surrendered to him in 1840. Within the twenty years immediately before action, therefore, there has been no possession adverse to the lord. Secondly: If it is necessary to show an earlier title in the lord, the evidence to be collected from the facts stated in the case is wholly inconsistent with the presumption, suggested by the other side, that the intention of the parties to the grant of 1781 was to pass the fee to the then grantees. From that year to the present, there is no evidence of any belief on the part of the parish that they held in fee, or of any intention on their part to dispute the lord's right to the fee. The reservation of the 5s. annual rent was itself an admission that the lord retained the fee, and the whole circumstances of the case are inconsistent with there having been any adverse possession by the parish or dispossession of the lord; and show, rather, that the parish were tenants at will, or at most from year to year, to the lord, at the time when stat. 3 & 4 W. 4, c. 27, passed. If so, that tenancy was determined and a fresh tenancy at will created in 1835, being within five years from the passing of the Act, by the admittance to the land, by the lord, of fresh trustees for the parish. Moreover, the case finds that the 5s. rent was paid regularly from 1781 to 1791, and again from 1825 to 1836.

The Court has power to draw inferences of fact, and will be warranted in inferring that the rent was regularly paid, also, in the years between 1791 and 1825. If that be so, the possession did not commence to be adverse, as against the lord, until 1836, when the payment of rent was first discontinued; and long before twenty years had elapsed *from that time, namely, in 1840, the lord regained possession. (a) [*166]

Lush, in reply.—No answer has been given to the first branch of the argument for the plaintiffs. Even supposing that the Court draw the inference that the 5s. was paid yearly to the lord from 1781 to 1836 without interruption; the question remains, *quo intuitu* was the payment made? It is clear from the case that the payment was not intended by the parties to the grant of 1781 to be a payment of rent, in the sense of rent-service, reserved upon a tenancy to the lord as an acknowledgment of his title; but that the holding by the grantees was quite incompatible with the notion that the fee remained in the lord. [BLACKBURN, J.—Conceding that the intention was that the fee should pass by the grant, the grant was, nevertheless, insufficient to pass it. Did not the grantees, therefore, when let into possession, become tenants at will to the lord according to the law as stated by Parke, B., in delivering the judgment of the Court in *Doe d. Gray v. Stanion*, 1 M. & W. 695, 700, where he says: "There is no doubt but that if there be an agreement to purchase, and the intended purchaser is *thereupon let into possession*, such possession is lawful, and amounts at *law, strictly speaking, to a bare tenancy at will." "The [*167] person suffered so to occupy cannot, on the one hand, be considered as a trespasser when he enters, and on the other hand, cannot have more than the interest of a tenant at will, the lowest estate known to the law."?] A tenancy at will is an ambiguous expression used by the law to describe a holding for an indefinite term, by one whom the landlord can turn out at any time. It may be granted, that if one man lets another into possession of land, on the understanding between them that he who is let into possession shall occupy as long as the other pleases, that is a strict tenancy at will, and possession under it can never be adverse. But if the intention of both parties is, that the person let into possession shall thereby acquire the fee, the possession given in furtherance of that intention is adverse, although in one sense it may be vaguely described as a tenancy at will. [HILL, J.—What difference is there in law between the two?] Perhaps there is no material distinction between them during the currency of twenty years from the commencement of the possession; but when that period has elapsed, it becomes material to consider what was the intention of the parties, in order to determine whether or not the possession was adverse during the twenty years. [HILL, J.—It is laid down, in sect. 70 of Littleton, that "if a man should make a deed of feoffment to another of certaine lands, and delivereth

(a) *Bocill* further argued that the plaintiffs could have acquired no title, because they did not show a conveyance of the land to them, enrolled under the Statute of Mortmain, 9 G. 2, c. 36; and that stat. 7 & 8 Vict. c. 101, s. 73, which enacts that conveyances of lands to parish officers for the purpose of providing workhouses, shall be good and valid though not enrolled pursuant to stat. 9 G. 2, c. 36, did not apply to a case like the present, in which there was no ground for presuming any conveyance at all. The argument on this point is however omitted, as it was not noticed by the Court.

to him the deed, but not livery of seisin; in this case he, to whom the deed is made, may enter into the land, and hold and occupy it at the will of him which made the deed, because it is proved by the words of the deed, that it is his will that the other should have the land; but he which made the deed may put him out when it pleaseth *168] him." And Lord Coke's comment *upon this is, (a) "Here it appeareth, that if the feoffee doth enter, he is tenant at will, because he entreteth b) by the consent of the feoffor." By that must be meant that the feoffee is not a trespasser, not that he is a tenant at will, strictly speaking. [BLACKBURN, J.—In *Doe d. Milburn v. Edgar*, 2 B. N. C. 498, 502 (E. C. L. R. vol. 29), the person under whom the defendant claimed was let into possession more than twenty years before action brought, under an agreement to purchase an allotment accruing to the vendor under an Enclosure Act, which provided that a purchaser let into possession of an allotment should have the same rights as the vendor. The person in question had paid interest on a portion of the purchase-money for some years, but never completed the purchase. It was held that, even after a lapse of twenty years, his possession was not adverse to the vendor's title. Tindal, C. J., in giving judgment, said, "The case has been likened to that of a feoffment without livery of seisin; and it has been urged that, if a party who is let into possession without livery, remain in possession twenty years, the whole period must be deemed an adverse possession on which he may maintain his right." He then cites Littleton, sect. 70, and Lord Coke's comment upon it, as showing that this argument was unfounded; adding, that the defendant in the principal case "was let into possession by consent of the owner of the land, and the continued payment of interest imports that he remained there only with the owner's permission."] That case seems inconsistent with *Doe d. Lansdell v. Gower*, 17 Q. B. 589 (E. C. L. R. vol. 79). Moreover, in *Doe d. Milburn v. Edgar*, the question whether the purchase was *169] completed was left to the jury; and *the decision of the Court would probably have been different had the finding been the other way. In the present case, if the plaintiffs' possession was adverse, as against the lord, in 1833, when stat. 3 & 4 W. 4, c. 27, passed, their title then became absolute. Even if the possession was not then adverse, but was that of tenants at will, the lord did not "make an entry or distress or bring an action to recover" the land, within five years from 1833, as he might have done under sect. 15 of the Act. In the view of the case, therefore, most unfavourable to the plaintiffs, the lord's title became extinguished in 1833, by reason of sect. 34, which provides that, at the end of the period limited by the Act to any person for enforcing his title, such title shall be extinguished. (c)

Cur. adv. vult.

COCKBURN, C. J., now delivered the judgment of the Court.

This was an action brought by the churchwardens and overseers of

(a) Co. Litt. 57 a.

(b) Sic.

(c) *Lush* also argued that the Statute of Mortmain, 9 G. 2, c. 36, had no application to the case; citing *Philpott v. President and Governors of St. George's Hospital*, and others, 6 H. L. Ca. 338, and *President, &c., of the College of St. Mary Magdalen, Oxford, v. The Attorney-General*, 6 H. L. Ca. 189. The argument on this point is omitted for the reason stated in note (a), p. 166, *supra*.

the parish of Mitcham to recover certain lands and premises of which the defendants are in possession, deriving title from James Moore, lord of the manor of Biggin and Tamworth, in the county of Surrey. The property in dispute was formerly part of the wastes of the manor in question, and, as such, part of the lord's freehold. It appears from the case that, on 21st August, 1781, the then lady of the manor, by *consent of the tenants of the manor, granted to five persons, named, license to enclose three acres and two roods, part [*170 of the waste, and that they and their heirs, and all persons claiming under them, should and might lawfully hold the same, so enclosed, in trust for the purpose of erecting and building a workhouse for the poor of the said parish of Mitcham, and for a garden and orchard for the further accommodation and benefit of the said poor, rendering to the lady of the said manor, and all other lords or ladies, lord or lady, of the said manor, the yearly rent of 5s. for the same in every year for ever. The churchwardens and overseers, in the year 1781, entered into possession, and, at the expense of the parish, erected a workhouse, and used and occupied it, up to and including the year 1836, as the workhouse of the parish. It appears, from the accounts of a deceased steward of the manor, that the yearly rent of 5s., reserved by the grant, was paid to the lord of the manor, from the year 1781 to the year 1791; and it appears, from the books of the churchwardens and overseers of the parish, that this rent was further paid from the year 1825 to 25th March, 1836. We think ourselves warranted to infer that it was paid during the interval between 1791 and 1825. On 10th October, 1836, the five persons to whom the license had been granted in 1781 being then dead, notice was given to the officers of the parish, by the steward of the manor, to nominate other persons for the purpose of admission, to save a forfeiture. Seven persons were accordingly nominated and admitted, the parish paying a sum of 79l. 17s. 6d., as a fine on their admission. In this proceeding the estate was treated by all parties, but, beyond all question, erroneously, as a copyhold tenement. In 1840, the *parish [*171 officers, in conformity with a resolution of the parish in vestry assembled, surrendered and gave up the premises to the lord of the manor, and the latter then entered and took possession, and afterwards conveyed the premises to the defendants.

The plaintiffs claim to recover possession, on the ground that, the parish having had adverse possession of the premises for more than twenty years at the time of the passing of stat. 3 & 4 W. 4, c. 27, the right of the lord was barred, and an indefeasible freehold interest acquired by the parish, which freehold interest was not afterwards divested by what took place on the admission in 1835, or the surrender to the lord in 1840. The defendants, on the other hand, contend that the possession of the parish, up to the passing of stat. 3 & 4 W. 4, c. 27, was that of tenants at will, and that, consequently, the lord had a period of five years from the passing of the Act, before his right of entry expired; that within such five years a new tenancy at will was created by what took place, in 1835, and, consequently, a further period of twenty-one years accrued to the lord within which the estate at will might be determined, and that, within such twenty-one years,

namely, in 1840, the estate at will was put an end to by the entry and possession of the lord.

If the defendants are right in the position that the parish officers were possessed as tenants at will at the time of the passing of stat. 3 & 4 W. 4, c. 27, the defendants must prevail; as we are clearly of opinion that, if the first tenancy was a tenancy at will, the admission in 1835 operated to create a fresh tenancy of the same kind. If, before the right of entry upon a tenant at will is gone, the tenancy is
 *172] put an end to, and *a new tenancy at will created by fresh agreement, express or implied, between the parties, then, according to the decision in *Doe d. Bennett v. Turner*, 7 M. & W. 226 (with which we concur), a fresh right of entry accrues, and an additional period of twenty years must run before that entry would be barred. Whether such a fresh tenancy was created or not is a question of fact. It is true that the admission in 1835 took place under an erroneous belief that the property was copyhold; but this mistake does not prevent the transaction from operating as what we find it really was, namely, a determination of the first tenancy at will, and the creation of a new one; inasmuch as, the admission being inoperative to convey a copyhold estate, the possession under it amounted in point of law to no more than a tenancy at will. The right of entry of the lord, after this, would not be barred by efflux of time till 1855. But in 1840, long before it was barred, the lord of the manor, Mr. Moore, actually entered, and from that time he and those who claim under him had both possession and title to the premises. This being so, we are brought back to the question whether the holding of the plaintiffs, up to stat. 3 & 4 W. 4, c. 27, was as tenants at will, or whether their possession had been adverse. It was contended, on the part of the plaintiffs, that the intention of the parties was that a freehold interest should be created (the grant of the license being to the licensees and their heirs for ever), and that the rent was reserved as a quit rent, after the manner of the rents reserved in ancient times on the grant of freeholds by lords of manors; and that, although such a
 *173] grant would not operate in law as a conveyance *of the freehold, yet, the parties having intended to create a freehold estate, possession under the grant would be of a character incompatible with the notion of a freehold title in the grantor, and would therefore be an adverse possession. The proposition of the plaintiffs, that, where there is an intention to convey a freehold estate, and possession is given accordingly, but, owing to some defect in the conveyance in point of law, an estate at will only is created, possession under such circumstances will amount to an adverse possession, if true in point of law (a matter which it is not necessary to determine), must at all events be taken with this qualification, namely, that the intention that the holding should be in the character of a freehold must clearly appear. The incompatibility of the possession with the notion of the freehold remaining in the former owner must be fully established, or the presumption that that which in law is an estate at will was only intended to be such must prevail. But, in our opinion, the plaintiffs fail to establish that there was, in the present case, an intention to create a freehold estate. The so called grant does not purport to convey the fee in the ordinary way. It merely purports to grant a

license to enclose the land and to hold it in trust, paying a yearly rent for the same. The argument as to intention, arising from the fact of the grant being made to the grantees and their heirs for ever, is met by the reservation of a yearly rent; more especially as this rent could not be effectually reserved unless the grantor reserved to herself the freehold; and we can see no reason why we should not give effect to this reservation. It seems to us that the terms of the license as strongly manifested that the lady of the manor should for ever have the lordship of the land, as that the licensees should hold the land for ever. Moreover, the fact of the parish having submitted, in 1835, to the demand of the lord to nominate fresh trustees for admission, at a time when, from the effect of the recent statute, had their possession been adverse, they would have acquired an indefeasible title against the lord, is inconsistent with the notion of their having held as freeholders. On the contrary, such a proceeding is evidence of an acknowledgment that the freehold was in the lord. See *Doe d. Jackson v. Wilkinson*, 3 B. & C. 413 (E. C. L. R. vol. 10); *Doe d. Thompson v. Clark*, 8 B. & C. 717 (E. C. L. R. vol. 15). Besides this, the payment of the annual rent, even if it did not turn the holding from a tenancy at will into a tenancy from year to year (which would exclude all question as to adverse possession), a question which in the view we take of the case it is unnecessary to consider, at all events affords strong evidence that the holding continued permissive; and, as the lords of the manor could, before the statute had run, have turned the licensees out of possession, and probably would have done so, if at any time they had refused to pay the 5s. which they had stipulated to pay "for that holding," we cannot but draw the inference that each successive payment of 5s. was a fresh acknowledgment that the land was held by the permission of the lord of the manor. It is enough for the decision of this case that we think that, on these facts, the plaintiffs have not established that the holdings which originally had been permissive had, before 1833, become adverse. The onus lies on them to do so, and we do not think they have succeeded. If this be so, the possession was not adverse when stat. 3 & 4 W. 4, c. 27, received the Royal assent. The then lord of the manor had five years more, during which his right was preserved; and he might, at any time before 1838, have entered and resumed possession of the premises.

We have hitherto spoken only of the part of the premises which was comprised in the license of 1781. Besides this, the parish officers, in 1817, took possession of two roods ten perches of land, parcel of the waste, and enclosed the same, and held possession of it and enjoyed it with the residue. The lord's right of entry to this portion of the land could not, under any view of the case, be barred before 1837; and, as this portion of the premises was included in the surrender and readmittance, in 1835, before the right of entry was barred, and was also taken possession of in 1840, the defendants are equally entitled to this portion as to the other.

We therefore answer the questions put to us by saying that, in 1840, the churchwardens and overseers of the poor had no greater interest in the premises than that of tenants at will, or, at most, tenants from

year to year; and, secondly, that they were not entitled to the possession of the premises at the time they brought the action.

The result is that there must be judgment for the defendants.

Judgment for the defendants.

***176] *IN THE EXCHEQUER CHAMBER.**

(Error from the Queen's Bench.)

MACDONALD v. LONGBOTTOM. *June 15.*

[Reported, E. & E. 987 (E. C. L. R. vol. 102).]

JOLLY v. The WIMBLEDON and DORKING Railway Company.
June 15.

[Reported, in the Queen's Bench and in the Exchequer Chamber on error from that Court, 1 B. & S. 807 (E. C. L. R. vol. 101).]

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

GREENOUGH v. McCLELLAND. *June 15.*

Reported, 2 E. & E. 429 (E. C. L. R. vol. 105).]

***177] *IN THE EXCHEQUER CHAMBER.**

(Error from the Queen's Bench.)

DESLANDES v. GREGORY. *June 15.*

[Reported, 2 E. & E. 610 (E. C. L. R. vol. 105).]

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

BETTS v. MENZIES. *July 7.*

[Reported, 1 E. & E. 1020 (E. C. L. R. vol. 102).]

ZWILCHENBART v. ALEXANDER. *July 7.*

[Reported, in the Queen's Bench and in the Exchequer Chamber on error from that Court, 1 B. & S. 234 (E. C. L. R. vol. 101).]

WILEY v. CRAWFORD. *July 7.*

[Reported, in the Queen's Bench and in the Exchequer Chamber on error from that Court, 1 B. & S. 253 (E. C. L. R. vol. 101).]

***LEARY, Appellant, v. LLOYD, Respondent.** *May 26; [178 July 7.*

The sections coming under the head of "Discipline" in The Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, have reference to British ships alone.

One of these, sect. 257, renders liable to a penalty "every person who wilfully harbours or secretes any seaman or apprentice who has deserted from his ship." Held that, in order to convict an offender under this section, it must be shown that the ship deserted from is a British ship: and that, inasmuch as by sect. 19 "every British ship must be registered," "and no ship" thereby "required to be registered shall, unless registered, be recognised as a British ship," proof that the ship is registered must also be given, either by the production of the original register, or by an examined or certified copy of it, as required by sect. 107.

CASE stated by justices under stat. 20 & 21 Vict. c. 43.

On 25th January, 1860, George Lloyd, the respondent, who is the police officer employed by the Newport Dock Company for the protection of the shipping frequenting the Newport Docks, within the borough of Newport, in the county of Monmouth, and to prevent seamen from deserting their vessels, laid an information, not in writing, before one of the justices for the said borough, against the appellant, Dennis Leary, who keeps a sailors' lodging-house and beer-house at Newport, for having wilfully harboured certain seamen who had deserted their vessel. The information was laid under sect. 257 of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104; and a summons was issued and served upon the appellant, who appeared, with his solicitor, at the Town Hall, Newport, on Friday, 27th January, 1860, before two of the justices of the said borough (by whom this case was stated), to answer the charge.

The summons recited that information had been laid "That you, Dennis Leary, did on 22d January, 1860, at the borough of Newport aforesaid, then and there wilfully harbour Peter Smith, Allen McIntyre, Ferdinand Pamin and John Brown, seamen who had deserted *from the British ship Sultana, knowing or having reason to believe such seamen to have so deserted." [179

Evidence of the witnesses in proof of the offence as alleged in the summons was duly taken on behalf of the respondent in the presence of the appellant and his attorney, who cross-examined the witnesses: and, no evidence being called by the appellant in reply, the magistrate deemed the offence proved, and convicted the appellant in the

penalty of five pounds, including the costs, in reference to one Peter Smith, one of the seamen whom the appellant had harboured in his house. The appellant, being dissatisfied with the determination and conviction of the justices, duly applied in writing to them to state and sign a case for the opinion of the Court of Queen's Bench thereon, which the justices agreed to grant to him, and he (the appellant) having entered into a recognisance to prosecute without delay his appeal, and having otherwise complied with the statute 20 & 21 Vict. c. 43, the said justices stated and signed the case accordingly.

The following evidence was adduced at the hearing in support of the information.

It was proved, by Samuel Brewster, that he was the master of the British ship, *Sultana*, of Liverpool, of 1316 tons burthen, then lying in the Newport Docks, within the said borough, where she had arrived a week previously from Antwerp; that eleven seamen, who were on the ship's articles of agreement (which were produced) and who had arrived at the port of Newport with him in the vessel, had all deserted the said ship; that Peter Smith, Allen McIntyre, Ferdinand Pamin, and John Brown, named in the summons, were four of the eleven seamen who had so deserted; that the men signed the

*180] articles at Antwerp, to come to the port of Newport and from thence to proceed to a port in the United States and back to a port of discharge in the United Kingdom; that the men, having only just commenced their voyage, and having no right to leave the ship, deserted either on the night of the 21st or 23d January, 1860, and took away all their clothes and effects with them. The official log book of the ship was not produced, but it was proved that the aforesaid Peter Smith, Allen McIntyre, Ferdinand Pamin, and John Brown had severally been duly convicted, on 26th January, 1860, at Newport, by two of the justices for the said borough, of having deserted from the said vessel, *The Sultana*; and had been, each of them, sentenced to three weeks' hard labour for that offence.

The appellant's attorney here objected that there was no evidence before the magistrates that *The Sultana* was a British ship. That the evidence of the master that she was such, and the production of the articles of agreement signed by the deserting seamen, which were in the form required by The Merchant Shipping Act, 1854, was insufficient proof of the ship being a British vessel, in the absence of the certificate of registry, which he contended ought to be produced. He further contended that, in the absence of the official log book, no legal evidence was before the justices in proof of the men named in the summons being deserters.

The justices were satisfied with the evidence before them that the ship was a British ship, and that the seamen named on the summons had deserted from the said vessel. Sect. 244 of The Merchant Shipping Act, 1854, was referred to in reply to the appellant's attorney's objection.

*181] Michael Miles proved that he was the watchman employed on board *The Sultana* to watch the ship and see nothing went out of her; that he was going on board the ship at twenty minutes to six o'clock on Sunday night, January 22d; that *The Sultana* was lying second ship off the dock wall, a Bremen ship being moored next

to her; that he then and there saw Leary, the appellant, standing on the dock wall, and saw a bag of clothes thrown down on the wall, and one of Leary's men take away the bag. Miles, concluding that seamen were deserting, seized the bag of clothes, and took it from the man who was carrying it away, when another man (a sailor) ran up and said, "This is my bag," and pulled it away from the watchman. Leary stood by and said to the witness, "Miles, go on board your ship." Miles replied, "No, Leary; you are carrying on a pretty game here to-night, and I will report you for it." To this accusation Leary made no reply. The watchman then proceeded on board his ship, *The Sultana*, and in order to reach her he had to pass over the Bremen ship, lying next the quay wall. On the deck of the Bremen ship he saw beds and other seamen's effects wrapped up, and some seamen standing by. He called the mate of the Bremen ship, and asked him if the beds, &c., belonged to the vessel; and the mate replied, in the hearing of Leary, who was then standing under the Bremen ship's bows, that they belonged to *The Sultana*.

It was then proved by George Lloyd, the respondent, that, in consequence of the information he had received from Captain Brewster and the watchman Miles, he went, with other police officers, to the house of the appellant, on 23d January, and in his house they found *four of the eleven men who had deserted, namely, Peter [*182 Smith, McIntyre, Pamin, and Brown, named in the summons. They were in the tap room openly; a fifth man, on seeing the officers, ran away. The seamen were taken to the police station, and on the following day were duly convicted before two justices and were severally committed to prison, for deserting their said ship *Sultana*. It was proved that Leary was present or in his house at the time the deserters were so taken out of it; but George Bath, one of the police officers who went with the respondent to apprehend the said seamen, proved that he saw Leary in the street, in the evening of the day on which the said four seamen were taken into custody, and told him (Leary) that four sailors had been apprehended in his house for deserting from *The Sultana*. Leary replied, "Is that all?" The witness, Bath, said "Yes." Leary said, "There are some more there; I don't want them; they came to me. The captain can have them if he likes. They shall pay me for their board before they get their clothes."

The appellant's attorney having contended that there was no evidence to show that the bag of clothes thrown from, or the effects found upon, the Bremen ship, were part of the effects of the deserting seamen from *The Sultana*, and that the appellant did not know the men were deserters, the justices, looking at all the circumstances proved in evidence, deemed the offence proved in reference to Peter Smith, and convicted the appellant in the penalty of 5*l.*, including costs, for wilfully harbouring him, knowing, or having reason to believe he had deserted his ship.

The question for the decision of the Court was, whether the conviction was right or wrong.

*No counsel appeared in support of the conviction.

Dowdeswell, for the appellant.—The justices were wrong in [*183 convicting the appellant, in the absence of legal proof that *The Sultana* was a registered British ship. The conviction was under sect.

257 of the Merchant Shipping Act, 1854, which renders liable to a penalty "every person who wilfully harbours or secretes any seaman or apprentice who has deserted from his ship," "knowing or having reason to believe such seaman or apprentice to have so done." Now, inasmuch as this section occurs in Part III. of the Act, by "ship" must be meant a "sea-going" ship "registered in the United Kingdom"; sect. 109 declaring that the whole of the Third Part of the Act shall apply to all such ships. And by sect. 19, "Every British ship must be registered in manner" thereafter "mentioned"; and no ship "thereby" "required to be registered shall, unless registered, be recognised as a British ship." In order, therefore, to bring the appellant within the operation of sect. 257, it was imperative upon the respondent to prove to the justices that The Sultana was a registered British ship. The only evidence adduced for that purpose was the statement of the captain; whereas, by sect. 107, the Act requires the register to be proved, "either by the production of the original or by an examined copy thereof, or by a copy thereof purporting to be certified under the hand of the registrar or other person having the charge of the original." At common law, no doubt, the ownership of a ship might be sufficiently proved by parol evidence of the possession of the owners as owners, without the aid of any documentary *184] proof or title deeds *on the subject: *Robertson v. French*, 4 East 180, 186, 187; and, in *Sutton v. Buck*, 2 Taunt. 302, possession of a ship under a transfer, void for non-compliance with the then register Acts, was held a sufficient title in trover against a stranger for parts of the ship, being wrecked. But the provisions of The Merchant Shipping Act, 1854, render it imperative to prove the registry and the British character of a ship in the manner thereby required. Again, in the absence of the official log book, there was no sufficient evidence before the justices that the seamen were deserters. Sect. 244 requires entries of the commission of offences by seamen to be made in that book and signed by the master and also by the mate or one of the crew, and enacts that "in any subsequent legal proceeding" such "entries" "shall, if practicable, be produced or proved, and in default of such production or proof the Court hearing the case may, at its discretion, refuse to receive evidence of the offence." [BLACKBURN, J.—Under that section the justices had a discretion to receive other evidence, if they thought fit.] Then, lastly, there was no evidence to show that the appellant knew or had reason to believe that Smith was a deserter. [WIGHTMAN, J.—Surely there was some evidence of that.]

COCKBURN, C. J.—Upon the first point, the Court will take time to consider; but we all think that there is nothing in the others.

Cur. adv. vult.

BLACKBURN, J., now delivered the judgment of the Court. (a) This *185] was an appeal against a conviction on *an information under the 257th section of the Merchant Shipping Act, 1854, for harbouring a deserter from the British ship Sultana. On the hearing, before the magistrates, no certificate of the registry of the ship having been produced, an objection was taken that there was no proof that the ship in question, which was alleged to be a British ship, had been

(a) Cockburn, C. J., Wightman and Crompton, J.

registered pursuant to the requirements of the Act in question and that the information, therefore, could not be sustained. The magistrates having overruled this objection, the same point was taken before us upon the hearing of the appeal; and we are of opinion that the objection is well founded and must prevail. After a careful consideration of the Act, we are of opinion that the sections coming under the head of "Discipline," of which the section in question is one, have reference to British ships alone. But, by the 19th section, no ship, required to be registered, shall, unless registered, be recognised as a British ship. It follows that in a proceeding in which it becomes necessary to show that a ship is a British ship, proof of the ship having been registered becomes essential, to invest the ship with the character of a British ship. Such proof was, in the present case, wanting; and its absence ought, in our opinion, to have prevented a conviction from taking place. We, therefore, hold that the conviction was wrong and must be reversed.

Conviction reversed.

*The QUEEN, on the prosecution of the Churchwardens and Overseers of the Poor of St. MARY, CARDIFF, Respond. [*186
ents, v. The Company of Proprietors of the GLAMORGANSHIRE
CANAL NAVIGATION, Appellants. Jan. 18; July 7.

The Act incorporating appellants, a canal Company, provided that the Company should "from time to time be rated to all parliamentary and parochial rates and assessments for and in respect of the lands and grounds to be purchased or taken by the" "Company" "in pursuance of" the "Act, in the same proportion as other lands lying near the same are or shall be rated, and as the same lands and grounds so to be purchased or taken would be rateable in case the same were the property of individuals in their natural capacity."

In pursuance of the Act, the Company purchased lands and made the canal. At that time the lands adjoining those so purchased were let for use as mere land; but they afterwards greatly increased in value, and at the time that the rate now appealed against was made, were extensively built over, and worth, if let for the purpose of being built on, 6d. per annum the square yard. The average rateable value, at the time of making the rate, of the nearest land to the canal which was then still used as mere land, was about 3l. per acre per annum. Upon other land adjoining the canal, wharfs, yards and buildings had before then been erected, the average rateable value of which was then 5d. the square yard.

On a case stated for the opinion of this Court by Sessions, on an appeal by the Company against a poor-rate made by respondents, for a parish in which part of the canal was situate, to which appellants were assessed in the same proportion as the lands lying near the canal were rated, as occupied at the time the rate was made: Held, that appellants were not rateable in proportion only to the rateable value of the whole of the lands adjoining the canal, considered as mere land; but that the true principle of their rateability was that the adjoining land covered with buildings should be brought into hotchpot with the adjoining lands of other descriptions, and that appellants should be rated for the land occupied by the canal according to the aggregate value, at the time of making the rate, of the whole land brought into hotchpot: that value being the rent which a tenant from year to year would give for the whole; in estimating which, regard was to be had to that proportion of the rent paid by the tenant of any building standing on the land, which he might be supposed to pay in respect of its site as enhanced in value, beyond the uncovered land, by being built upon.

UPON an appeal to the Glamorganshire Quarter Sessions against a rate for the relief of the poor, duly made by the respondents on 19th December, 1857, and to which the appellants were assessed, the Sessions confirmed the rate, subject to the opinion of this Court on the following case.

*187] The appellants are, and at the time of making the rate *hereinafter mentioned were, the owners and occupiers of the Glamorganshire Canal. Part of that canal, running nearly north and south, is situate in the parish of St. Mary, Cardiff. By a rate or assessment for the relief of the poor of the said parish, duly made on 19th December, 1857, and which rate was duly allowed and published, the appellants were rated as the occupiers of that part of the canal lying within the said parish, and the other lands, tenements, and premises, occupied by them within the same. The Company of Proprietors of the Glamorganshire Canal Navigation were incorporated under an Act of Parliament passed in the year 1790, 30 G. 3, c. lxxxii., (a) entitled "An Act for making and maintaining a navigable canal from Merthyr Tidville, to and through a place called The Bank, near the town of Cardiff, in the county of Glamorgan." The said Act, after a preamble reciting that the making and maintaining the proposed canal would open communications with several extensive iron-works and collieries, and be of public utility, incorporated the Company by and under the name of "The Company of Proprietors of the Glamorganshire Canal Navigation," and authorized and empowered the said Company to make and maintain the said canal, and to purchase and take lands for the use of the undertaking, and to take certain rates and tolls from persons using the said canal. By sect. 67 of the above Act it was enacted, "That the said Company of proprietors shall from time to time be rated to all parliamentary and parochial rates and assessments for and in respect of the lands and grounds to be purchased or taken by the said Company of proprietors in pursuance *of this Act, in the same proportion as other lands and

*188] grounds lying near the same are or shall be rated, and as the same lands and grounds so to be purchased or taken would be rateable in case the same were the property of individuals in their natural capacity." The above is the only section of the Act which has reference to the subject of rating the Company's property. This section was afterwards incorporated in another Act, 36 G. 3, c. lxxix. (b) By virtue of these two Acts, the Company purchased and took certain lands, and made the canal and the works connected therewith, part of which said lands and premises lies within the said parish of St. Mary, Cardiff, and is the property rated as above. Before and at the time of the formation of the said canal and the works connected therewith, the lands purchased and taken by the Company in the said parish for the purposes of the said canal and works, and the lands adjacent and lying on each side thereof, were of very much less value than they are at present. The whole of the land taken was at that time let at the usual rent given for land in the neighbourhood of towns; but now, owing to the rapid increase of the population and the consequent need of further house accommodation in Cardiff, the adjoining land has been extensively built over, and is the site of several streets and squares. Such land is now worth, when let for the purpose of being built on, 6d. per annum the square yard. The average rateable value of the land lying nearest to the canal and towing path, on the eastern

(a) Local and personal, public.

(b) Local and personal, public. "To amend" stat. 30 G. 3, c. lxxxii., "and for extending the said canal to a place called The Lower Layer, below the said town."

side thereof, which is used as mere land, is about 3*l*. an acre per annum. On the western side of *the canal the lands and pre- [*189
mises taken and occupied by the Company, under the said Acts, are abutted upon by wharfs and yards in the occupation of iron masters and other private individuals, used for the purposes of trade and commerce. These wharfs and yards, with the buildings belonging thereto, are actually rated as wharfs and yards, at various sums which, together, give an average of about 5*l*. the square yard of the land occupied thereby. Beyond the said wharfs and yards on the western side, immediately adjoining them, and within a short distance of the Company's canal and the premises connected therewith, is a quantity of land, separated from the canal only by the wharfs, and which is used as mere land; the rateable value whereof, and of the other land in the immediate vicinity, was taken, for the purposes of the said appeal, at an average of 3*l*. an acre per annum. Until the rate, the subject of appeal, was made, the Company had been rated by the said parish in respect of the said land under the canal and towing path, at the sum of 120*l*. per annum only, in respect of the lands and premises mentioned; and that sum was admitted, for the purposes of the said appeal, to be the full rateable value of the lands and premises taken and occupied by the Company under the said Acts, situate within the said parish, supposing the same to be assessed and rated at the average annual rateable value of the land, used as mere land, lying nearest thereto. By the present rate the appellants are rated for the bed of the canal and the towing paths in the same proportion as the lands and grounds lying near thereto are rated in the same assessment, and in the same proportion in which they would be rated in case they were the property of individuals in their natural capacity.

*At the Quarter Sessions the appellants confined their objections to the principles so adopted by the respondents and [*190 involved in the said assessment. They contended that, by the principle of rating so adopted by the parish, they were assessed at too high an amount in respect of the lands occupied by the bed of the canal and the towing paths, and also in respect of the lands and premises abutted upon by the wharfs and yards. They contended that, under the provisions of the 67th section of the Act, they were only liable to be assessed, in respect of their lands and premises, at the rateable value of land adjoining thereto, if the same had remained mere land, and at the time of the rate was used only for purposes consistent with its retaining that character. The Court of Quarter Sessions found, for the purposes of this case, that the lands and grounds occupied by the appellants were not overrated, if the correct principle was to rate their lands and grounds in the same proportion as the lands and grounds lying near were rated, as occupied at the time of making the said rate, and as if the lands and grounds were the property of individuals. But that the appellants were overrated, if their lands and grounds should have been assessed as the lands and grounds lying near thereto would have been, if they had continued to be used as mere land.

The question for the opinion of the Court was, whether the principle of assessment adopted by the respondents is based upon the correct construction of the provisions of the Act regulating the rating

lands adjacent. [COCKBURN, C. J.—If so, might not a difficulty arise, if there was a difference in the value of the lands adjacent on the opposite sides of the canal?] In such a case the Sessions would strike an average. The appellants' Act makes their lands and grounds rateable in the same *195] "proportion as other lands and grounds "lying near the same." Those lands, &c., can be ascertained with as much certainty as though they had been scheduled to the Act. What constitutes "lying near is" a question of fact for the Sessions; and they have found as a fact that the lands and grounds occupied by the appellants are not overrated, if the correct principle is to rate them in the same proportion as the lands and grounds lying near were rated, as occupied at the time of making the rate, and as if the lands and grounds were the property of individuals. The appellants will rely upon *Regina v. The Grand Junction Canal Company*, 7 Weekly R. 597. The Company, in that case, were, under their Acts of Parliament, to be rated in respect of their lands and grounds already purchased or taken, or to be purchased or taken, and all warehouses and other buildings to be erected by them, in the proportion that other lands, grounds and buildings lying near the same were or should be rated, and as the same lands, grounds, and buildings would be rateable in case the same were the property of individuals in their natural capacity. When the canal was made, the land taken for and that adjoining the canal alike consisted of agricultural and garden land; but of late years the land adjoining had become applicable for building purposes, and large portions of it had been let for such purposes on leases for ninety-nine years, at ground rents greatly exceeding the rents at which the lands could be let for agricultural and garden purposes; and buildings had been erected on such lands, in pursuance of the covenants contained in the leases. The increased rentals could not have been obtained, *196] "unless the lands had been let for long terms, and on building leases containing the usual covenants. Upon these facts the question arose, upon what principle the sum at which the canal was rateable ought to be estimated. The Court consisted only of Lord Campbell, C. J., and Erle, J., and the following brief judgments were delivered. Lord Campbell, C. J., said, "We are" "clearly of opinion that this canal and towing-paths cannot be rated at the value of land let on building leases. That land must be rated on the principle of what a tenant from year to year would give for it, and under those circumstances he would not build upon the land." And Erle, J., "It is often the case that land near to a house is the subject of a covenant not to be built on, and this land occupied by the canal and towing-paths is in a similar position. The Company ought to be rated according to the value of land near the canal in its natural state, viz., at the value a tenant from year to year would give for it, and not on its building value." The marginal note represents the Court to have held, "that the Company were to be rated for their lands at the same value as other adjacent lands used for agricultural or garden purposes." That, however, is an incorrect statement of the decision, which merely was, as the marginal note proceeds to say, that the Company were "not" to be rated "at the value of adjacent lands let, or capable of being let, on building leases." It is not now contended, for the respondents, that either the applicability to building purposes of the

land adjoining the appellants' property, or the rent which a lessee of it for a long term of years, for such purposes, would give, is to be taken into account. The respondents admit that the true criterion is the rent which a *tenant from year to year would give for the lands. [WIGHTMAN, J.—Suppose that the whole of the lands [*197] were covered with buildings which produced a great increase of rental. Might the parish take the increase into account?] Yes; so far as the value of the land was enhanced to a tenant from year to year, by being built upon. [COCKBURN, C. J.—If your contention is right, the Company are exposed to great hardship, being rateable on the improved value of the land adjoining the canal, but without the power of increasing the value of their own land.] The hardship, if any, results from the bargain made by the Company with the parish; which is embodied in and must be collected from the Act of Parliament. Moreover, the land taken by the Company is taken out of the hands of the parish.

Bovill, H. Giffard, and G. B. Hughes, for the appellants.—The rate is excessive. Even assuming that the appellants are rateable, under the 67th section of their Act, in the same proportion as the lands and grounds lying near the canal were rated at the time of making the rate, so much of the adjacent lands and grounds as were at that time covered with wharfs and buildings are not "lands" within the meaning of the Act, which must refer to lands used merely as such. If the Court adopt the opposite construction of the enactment, the clause, which was intended to protect the canal Company from an excessive impost, will, as has been pointed out by Cockburn, C. J., become the means of inflicting upon them an increased burthen. The first lands, left in their natural state, which are reached, after leaving the canal, are the lands the rateable value of which is to be considered for the purpose of rating the canal. * [COCKBURN, C. J.—In course [*198] of time the whole of the lands adjacent to the canal will probably be covered with buildings.] If so, the first uncovered land, beyond the buildings, would then become the "lands" "lying near" the canal, within the meaning of the Act. [COCKBURN, C. J.—That would strain the language of the Legislature very much.] *Regina v. The Grand Junction Canal Company, 7 Weekly R. 597*, is strongly in point to show that, even if the rateable value of the land immediately adjoining the canal is to be taken as the criterion of the rateability of the canal, that rateable value is the rent which a tenant from year to year would give for such land in its natural state; not that which a lessee of it for building purposes would give. That case was decided on the authority of *Rex v. The Grand Junction Canal Company, 1 B. & Ald. 289, 298, 295*, in which Lord Ellenborough, C. J., in giving judgment, said, "The" "Act directs that the Company shall be rated for and in respect of their lands in the same proportion as other lands near the same, and as the same would be rateable in case they were the property of individuals in their natural capacity, by which I understand that they are to be rated as other lands would be supposing them not to be applied to the purposes of the canal, but to have remained in the hands of individual farmers for the ordinary purposes of agriculture, and not possessing any artificial value." And Abbott, J., thus explained the reason for the legislative protec-

tion of the canal Company. "This was a scheme which might be wholly unproductive. We have all seen, in passing through the country, many instances in which similar undertakings have failed, *199] either from want of water or from *a change in the circumstances of the country through which the proposed line of canal was to have passed, and the Legislature, therefore, might not think it improper to insert a clause in a canal Act, the effect of which would be, that if the canal were not perfected, still the parishes should not be deprived of the benefit of the land which before that time paid rates to the poor, and that if the canal were perfected, then the Company should be rated for it as land, at the rate at which the land was estimated before, when it was only subject to tillage." Moreover, The Parochial Assessment Act, 6 & 7 W. 4, c. 96, s. 1, requires poor-rates to be made upon an estimate of the net annual value of the several hereditaments rated thereto, that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of certain deductions. Now, a tenant from year to year would not take land for building purposes, but only for use as land. *Cur. adv. vult.*

COCKBURN, C. J., now delivered the judgment of the Court.

In this case the question turns upon the effect of a clause in a canal Act, whereby the proprietors are protected against being rated in respect of the increased value of the land occupied by the canal, by reason of its being so occupied, by a provision that the Company shall be rated "in the same proportion as other lands and grounds lying near the same are or shall be rated." A state of things has arisen which evidently is very different from that contemplated by the Legislature at the time the Act passed. The object of the enactment was to give immunity to the canal Company against being *200] *rated in respect of the increased value of the land, resulting from its occupation as a canal, as distinguished from its previous value, as used for agricultural purposes. But, in the new state of things which has arisen, the adjoining land, instead of being of inferior, has, by its being used as wharfs and its application to building purposes, become of greater value than the soil occupied by the canal. A provision which was intended for the benefit of the canal Company has thus become the means of casting an additional burden upon them, and entails on them a considerable hardship. Nevertheless, we are of opinion that full effect must be given to the enactment. Its language being clear and precise, it is not competent to us to modify its provisions, in order to meet a state of things which, if it could have been contemplated by the Legislature at the time of passing the Act, would probably have been provided against. Relief in such a case can only be sought at the hands of the Legislature, whose province we should be usurping if we were to put a construction on the Act different from what its terms warrant, in order to meet the equity of the case. We have no hesitation, therefore, in rejecting the proposed construction, that we are to consider, not what is the rateable value of the land immediately adjoining the canal, but that of the nearest agricultural land, no matter how far removed, in order to give effect to what the Legislature had in view in passing this clause. The enactment is clear and unambiguous, that the lands occupied by the Company shall be rated in the same proportion as

the adjoining lands. The Court cannot construe the enactment differently because the relative value of the land occupied by the canal and of the adjoining land have become changed. But a new *diffi- [201
culty presents itself, from the circumstance that the adjoining
lands are no longer rateable simply as land. They have become in
many instances covered with buildings of a valuable description, and
the value of the land becomes, as it were, merged in that of the build-
ings by which it is covered. It is possible, however, to ascertain the
value of the land as applicable and subservient to building purposes,
as distinguished from the joint value of land and buildings; but here
a new difficulty presents itself. By The Parochial Assessment Act,
property is to be rated according to the rent which a tenant from
year to year might be expected to give for it. Now a tenant from
year to year would not give for the land in question a rent equiva-
lent to its value for building purposes; it is only in the hands of a
lessee with a long term that the land would have this larger value.
For this reason this Court, then consisting of my Lord Campbell and
Erle, J., in the case of *Regina v. The Grand Junction Canal Company*,
7 Weekly R. 597, held, on a provision similar to the present, that
land occupied by a canal Company was not liable to be rated other-
wise than as agricultural land, notwithstanding that the adjoining
land was occupied as land covered with buildings. We cannot, upon
consideration, bring ourselves to acquiesce in the propriety of that
decision. It appears to us that, in applying the Parochial Assessment
Act to such a case as the present, the criterion is not what a tenant
from year to year would give for the land to be rated, that is, the
land occupied by the canal Company, but what such a tenant would
give for the adjoining land, according to the rating of which the land
in question is, by the provision of the enactment which we are called
upon to construe, to be rated. Now *the adjoining land, being [202
built upon, is worth so much to a tenant from year to year, as
land built upon. In the yearly rent paid for a building, a certain
proportion of the rent must be taken as paid in respect of the land
occupied by the building. That proportion, larger, no doubt, than
the value of the land if not applied to building purposes, is capable
of being ascertained. It is, in our opinion, the rateable value of the
adjoining land, and should be taken to be the proportion in which the
lands and grounds lying near the canal in question are rated, within
the 67th section of this Act of Parliament; and, consequently, as the
proportion in which the land occupied by the canal is to be rated.
To rate the latter according to what a tenant from year to year would
give for it, independently of what such a tenant would give for the
adjoining land, is, as it seems to us, to rate it independently of the
rating of the adjoining land; in other words, to give no effect to the
provision of the section according to which the rating is to be made.
We hold, on these grounds, that the position taken by the argument
of the appellants, that the whole of the land in question ought to be
rated as mere land, is not tenable, as relates to the adjoining land when
built upon or made into wharfs. But as, where the adjoining land
has not been applied to such purposes, it must be treated as land
under the Parochial Assessment Act, and cannot therefore be rated
as land applicable to building purposes, at all events beyond what a

tenant from year to year would give for it for such a purpose, it appears to us that the true principle on which the rate should be made is, that the land covered with buildings, valued as we have already pointed out, should be brought into hotchpot with the land *203] of the other *description, in each particular parish; and that the land occupied by the canal should be rated according to the aggregate value of the whole. This can, of course, be at best but a rough estimate; but it appears to us to be the only means of giving effect to the provisions of the various Acts of Parliament. The rate must therefore be amended accordingly.

Rate to be amended.

BLECH v. BALLERAS and Others. *June 22, July 7*

Plaintiff, having chartered a steamer, agreed with defendants to take out some engines in her to Barcelona, it being known to both parties that the engines could not be shipped unless some alterations were made in her hatchways. The agreement contained the following conditions. First: that plaintiff should lay the steamer on her berth at Liverpool for Barcelona. Secondly: that she should not be required to lie on her berth longer than ten days. Thirdly: that she should make the voyage from there to Barcelona for the lump sum of 650*l.*, plaintiff to pay all charges. Fourthly: that defendants should load in the steamer two engines and tenders complete, for 240*l.*, freight to be paid at Liverpool on delivery of bills of lading, without any deduction for interest or insurance. Fifthly: that such of the above goods as weighed above 20 cwt. should be put in the steamer, stowed, taken out and landed at shipper's risk and expense. Sixthly: that the said goods should be taken out of the steamer as soon as the captain was ready to deliver them, in five days, Sunday excepted; and 20*l.* sterling demurrage to be paid by the shipper or receiver of the said goods, for every day that she was detained over and above five days. Seventhly: that the steamer should be entered in the joint names of plaintiff and defendants, so that the latter might assist to get cargo. Eighthly: that any surplus of freight above 650*l.* should be divided between plaintiff and defendants, and also any loss which might result. Ninthly: that the said steamer should guarantee to carry 480 tons dead weight, besides 40 tons of coal in the bunkers. Tenthly: that the bills of lading for the whole cargo of the said steamer should be signed at the office of plaintiff. Eleventhly: that the steamer should be consigned at Barcelona to the friends of defendants, paying 2*l.* commission on the above freight.

The steamer was put on her berth at Liverpool, and, by consent of her owner, the beams in her hatchways were removed, for the stowage of the engines, at the joint expense of plaintiff and defendants. The engines, which exceeded 20 cwt. in weight, were then brought alongside; and it was found, before ten days had expired, that they would not go down the hatchways, notwithstanding the removal of the beams. The consent of the ship-owner to the further widening of the hatchways was thereupon obtained, on condition that the ship should, before sailing, be made right, to the satisfaction of Lloyd's surveyor. In consequence of the necessary delay for widening the hatchways and making the ship thus right, she lay on her berth thirteen days beyond the stipulated ten.

Plaintiff having brought this action, on the second clause of the agreement, for demurrage in respect of the detention by defendants of the ship on her berth beyond ten days: Held, that defendants were liable on that clause, it being collateral to and independent of any partnership in the freight; assuming that the agreement constituted a partnership to some extent between the parties in that respect.

The Judge directed the jury that, by reason of the 5th clause of the agreement, defendants were liable for any detention of the ship necessary to effect such alterations in her as would enable the engines to be put on board by defendants. Held a right direction.

DECLARATION. That, before and at the time of the making the *204] agreement hereinafter mentioned, *plaintiff was lawfully possessed of a certain screw steam-vessel called The William France, and thereupon afterwards defendants agreed with plaintiff as follows. First: that plaintiff should lay the steamer William France on the berth in Liverpool for Barcelona, on her arrival at Liverpool.

from London, having discharged her cargo. Secondly: that the said steamer should not be required to lie on her berth longer than ten days. Thirdly: that the said steamer should make the voyage from Liverpool to Barcelona for the lump sum of 650*l.*, plaintiff to pay all charges. Fourthly: that defendants should load in the said steamer two engines and tenders complete for 240*l.*, freight to be paid at Liverpool on delivery of bills of lading, without any deduction for interest or insurance. Fifthly: that such of the above goods as should weigh above 20 cwt. should be put in the said steamer, stowed, taken out and landed at the shipper's risk and expense. Sixthly: that the said goods should be taken out of the said steamer, as soon as the captain should be ready to deliver them, in five days, Sunday excepted, and 20*l.* sterling demurrage should be paid by the shippers or receivers of the above named goods, for every day she should be detained over and above five days. Seventhly: that the said steamer should be entered out in the joint names of plaintiff and defendants, so that the latter might assist in getting cargo. Eighthly: that any surplus of freight above 650*l.* should be divided between defendants and plaintiff, and also any loss which might result. Ninthly: that the said *steamer should guarantee to carry 480 tons dead weight, besides 40 tons of coals in the bunkers. Tenthly: that the bills [*205 of lading for the whole cargo of the said steamer should be signed at the office of plaintiff. Eleventhly: that the said steamer should be consigned at Barcelona to the friends of defendants, paying 2*l.* per cent. commission on the above freight. Averment: that plaintiff did accordingly lay the said steamer on the berth in Liverpool, according to the terms of the said agreement. Breach: that although, before suit, all conditions precedent had been performed and fulfilled, and everything had happened and been done, and all times had elapsed, necessary to entitle plaintiff to a performance of the said agreement by defendants, and to maintain his action for the breach thereof thereafter mentioned, yet defendants did not perform the said agreement on their part, and did require the said steamer to lie on her berth longer than ten days; and accordingly the said steamer was detained by defendants in and about the loading the said engines and tenders on board the said steamer at her berth, and the said steamer did, on that account, lie on her berth for a longer space than ten days, to wit, for the space of twenty-three days; and by reason of the premises plaintiff had been put to and incurred divers great costs and expenses, &c.

The declaration also contained counts for money payable by defendants to plaintiff for the demurrage of a ship of plaintiff kept on demurrage by defendants, and for money found to be due from defendants to plaintiff on an account stated between them.

Pleas. 1. To first count. That plaintiff was not possessed of the said vessel, and that defendants did not *agree as alleged. 2. To [*206 same. That plaintiff did not lay the said steamer on the berth in Liverpool for Barcelona, according to the terms of the said agreement, as alleged. 8. To same. That defendants did not require the said steamer to lie on her berth longer than ten days, and that the said steamer was not detained by defendants in or about the loading the said engines and tenders on board the said steamer, at her berth;

and that the said steamer did not, on that account, lie on her berth for a longer space than ten days. 4. To same. That, after the making of the said agreement, and before the committing of any breach thereof by defendants, and before this suit, plaintiff exonerated and discharged defendants from further performance of the said agreement. 5. To same. That plaintiff and defendants agreed together to become partners in a speculation of sending the said steamer to Barcelona, and the said agreement was the agreement by which they agreed upon the terms of the said partnership; and defendants say that the requiring the said steamer to lie on her berth longer than ten days, and the detaining of her in and about the loading of the said engines and tenders were done, not by defendants alone, but by defendants and plaintiff jointly. 6. To same. That plaintiff and defendants agreed together to become partners in a speculation of sending the said steamer to Barcelona, and that the agreement in the first count mentioned was the agreement by which they agreed upon the terms of the said partnership; and defendants say that the agreement on the part of defendants, that the said steamer should not be required to lie on her berth longer than ten days, and that defendants should load in the said steamer two engines and tenders complete, and that such *207] of the said goods as should weigh above 20 cwt. should be put in the said steamer, stowed, taken out and landed at the shipper's risk and expense, was made by defendants, not with plaintiff alone, but with the partnership firm, consisting of plaintiff and defendants, as partners in the said speculation; and that the damages sustained by reason of the breaches complained of formed an item in the partnership accounts, and plaintiff's interest therein could not be ascertained without winding up the partnership accounts, which was not done before suit. 7. To the money counts. Never indebted.

Issues on all the pleas.

At the trial, before Blackburn, J., at the Liverpool Spring Assizes, 1860, it appeared that the plaintiff, having chartered the screw steamer William France, made a written agreement with the defendants to take out certain engines and tenders in her to Barcelona. There was some doubt whether the engines could be put on board through the hatchways; and the agreement contained a clause that, if that could not be done, the agreement should be void and at an end. After some discussion between the parties with reference to this clause and to certain alterations in the ship by removing some beams in the hatchways, which it was anticipated would be necessary in order to get the engines on board, and which were not expected to be great or to occupy much time, the agreement was cancelled, and a fresh agreement was drawn up, being the agreement declared upon. The steamer was then placed upon the berth in Liverpool. With the consent of her owner, the beams in the hatchways were removed, at the joint expense of the plaintiff and the defendants, and the engines, which exceeded 20 cwt. in weight, and so came within the *208] provisions of clause 5 in the agreement, were brought along-side. It was then, within ten days of the steamer having been placed on the berth, found that, notwithstanding the removal of the beams, the engines would not go down the hatchways. The owner was thereupon applied to for his consent to having the hatchways

widened, which he gave, on condition that the ship should be made right, before she sailed, to the satisfaction of Lloyd's surveyor. There was a conflict of testimony as to much of what ensued, but it was clear that the ship did not sail till she had lain on her berth twenty-three days, and that her delay there beyond the stipulated ten days was occasioned, first, by cutting the hatchways in order to get the engines on board, and, afterwards, by making the ship good, to the satisfaction of Lloyd's surveyor.

It was contended, for the defendants, that they were not liable, on the ground that the agreement constituted a partnership between them and the plaintiff.

The learned Judge overruled this objection, but gave the defendants leave to move to enter a nonsuit. He also directed the jury that the defendants had, by the 5th clause of the agreement, undertaken that the engines should be put on board at their risk and expense, without any saving clause to protect them in the event of that proving to be difficult; and that, therefore, any detention of the ship occasioned by alterations necessary to enable the engines to be put on board was detention by the defendants.

The jury found for the plaintiff for thirteen days' detention of the ship, at 20*l.* a day, making 260*l.*

Milward, in last Easter Term, obtained a rule calling upon the plaintiff to show cause why the verdict should not be set aside and a nonsuit entered instead thereof *on the ground of the plaintiff [*209 being unable to sue at law on the agreement; or why a new trial should not be had, on the ground of the misdirection of the learned Judge in holding that the defendants were liable for any delay of the ship caused during the alterations needful to take the engines on board.

Mellish showed cause. (a)—Both points depend upon the construction of the agreement upon which the action is brought. As to the first, the question is, does or does not the agreement, properly construed, constitute a partnership between the plaintiff and the defendants? Now, the agreement is very inaccurately drawn: and although the 8th clause, stipulating that, in addition to any surplus of freight, "any loss which may result" is to be divided between the parties, looks at first sight as if the intention was to create a partnership, the substance of the agreement leads to the opposite conclusion. The plaintiff was the charterer of the ship, and the defendants had two engines and tenders which they wanted to send out in her to Barcelona. These not being sufficient to load the ship completely, it was necessary that an arrangement should be made for getting other goods in order to complete her cargo. The agreement now in question was entered into in furtherance of that object. By it 650*l.* was fixed as the whole sum which the plaintiff ought to receive for letting the whole of the ship. Out of this the *defendants were to pay [*210 240*l.* as freight for the engines and tenders, leaving 410*l.* to be obtained as freight for other goods. Both the plaintiff and the defendants were to endeavour to procure such further goods. It was

(a) Friday, June 22d, before Wightman, Crompton, Hill and Blackburn, Js.; of whom Wightman and Blackburn, Js., heard the whole of the argument, Crompton and Hill, Js., different parts of it. See the judgment, post, p. 219.

not expected that more could be procured than would make up the whole freight receivable by the plaintiff to the 650*l.*; but, in order to meet every contingency, the 8th clause was inserted, by which, on the one hand, any excess, and, on the other, any deficiency, upon that sum (after crediting the defendants with 240*l.*), was to be divided between the plaintiff and the defendants. It is to this possible deficiency that the words "any loss which may result," refer. Throughout the agreement no trace of an intention by the parties to share the profit and loss of the whole adventure, in addition to that upon the freight, can be discovered. On the contrary, the 3d clause provides that the plaintiff, receiving the lump sum of 650*l.*, is to pay all charges. If there was a partnership at all, it was limited to a partnership in the freight, and the 2d clause in the agreement, for the breach of which the action was brought, is wholly collateral to and independent of any such partnership; the damages arising from such breach being sustained by the plaintiff exclusively, and not being matters to be brought into the joint account of profit and loss. The only ground, therefore, on which courts of law have held that one partner cannot sue another, namely, that they possess no machinery for taking an account between the parties, is inapplicable to the present case. In the notes to *Waugh v. Carver*, 1 Smith's L. C. 883, *211] ed. 5, the test for ascertaining "whether an actual partnership exists is thus stated. "Partnership is either *actual* or *nominal*. Actual partnership takes place when two or more persons agree to combine property, or labour, or both, in a common undertaking, sharing profit and loss. 'I have always,' says TINDAL, C. J., in *Green v. Beesley*, 2 B. N. C. 112, 'understood the definition of partnership to be a mutual participation in profit or loss.' But with respect to third persons, an *actual* partnership may subsist where there is a participation in the *profits*, even though the participant may have most expressly stipulated against the usual incidents to that relation." In *Dixon v. Cooper*, 3 Wils. 40, which was an action for not accepting 800 quarters of wheat, a factor for the plaintiff, who made the contract with the defendant, and was to have 1*s.* in the pound for selling the wheat, was the only witness at the trial who proved the contract. It being objected that he was not a competent witness, as being interested, the point was reserved for the opinion of the Court: and it was held that he was a good witness, being, as a factor, concerned both for the vendor and vendee as a mere go-between, and so a good witness for either of them. [WIGHTMAN, J.—That case is scarcely in point.] In *Dry v. Boswell*, 1 Campb. 329, an agreement between A., the sole owner of a lighter, and B., a lighterman, that B. should work the lighter, and in consideration thereof should have half her gross earnings, was held not to constitute a partnership between them, being only a mode of paying B. for his labour.

*212] Secondly, as to the alleged misdirection. The learned *Judge properly directed the jury that the fifth clause of the agreement imposed upon the defendants the absolute responsibility of shipping the engines at their own risk and expense, and that they were therefore liable for any delay, however caused, in the process of shipment. They have detained the ship for their own exclusive

purposes, beyond the stipulated ten days, and must therefore pay for the detention.

Milward and Crompton Hutton, in support of the rule.—First: the agreement constituted a partnership between the plaintiff and the defendants. The transaction amounted to this: the plaintiff, being, pro hac vice, the owner of the steamer, and capable of letting her for any purpose, says to the defendants, "You have a house at Barcelona, and you want to send your engines and tenders out there; I am willing to join you in the speculation of sending them in my ship." The defendants accept this offer, and the agreement is entered into, by which the plaintiff is to be paid by the partnership a lump sum of 850*l.* for bringing the ship into the adventure, upon the condition that the profit or loss of the adventure beyond or below that sum is to be shared equally between the partners. The stipulation that the plaintiff was to pay all charges meant no more than that he was to contribute to the partnership the sailing expenses as so much capital. In an action against third persons for not shipping goods on the steamer, supposing them to have contracted to ship them, the plaintiff must have joined the defendants as co-plaintiffs, or he would have been nonsuited. [WIGHTMAN, J.—Suppose that goods had been shipped, the freight of which would, with the *240*l.* paid by [*218 the defendants, have amounted to exactly 850*l.* In that case [*218 the defendants would have had nothing further to pay or to receive.] It may happen, in any partnership, that the outgoings exactly equal the incomings; but such a state of things does not affect the nature of the partnership. Moreover, the 240*l.* to be paid at Liverpool by the defendants is a partnership item paid by them in advance; they would have been entitled to a return of it had the ship not performed the voyage; and the plaintiff, being their partner, could not have sued them for it if unpaid. [CROMPTON, J.—Supposing the right construction of the second clause to be, that the defendants should not require the ship to remain on the berth more than ten days, how can the damages arising from her detention beyond that time be a partnership item?] The money paid by the defendants on that score would go into the general accounts of the partnership. The right construction, however, is that the partnership shall not require the detention. [BLACKBURN, J.—To whom do you say that the 240*l.* was payable under the 4th clause?] To the partnership. The agreement was, in effect, that the plaintiff should contribute the ship, not to the defendants alone, but to the partnership; and the defendants were to pay the 240*l.* to the partnership, as an equivalent contribution on their part. Clauses 7 and 8 relate to the joint management of the speculation by the partnership. By clause 9, the plaintiff, who must be meant by "the steamer," guarantees to the partnership that the steamer is of a certain capacity. Clause 10 makes the plaintiff's office the office of the partnership, for carrying out the speculation. Clause 11, by which the steamer is to be consigned at *Barce- [*214 lona to the friends of the defendants, shows that the parties [*214 knew how to word the agreement directly in favour of one of them, when that was their intention. Secondly: the learned Judge misdirected the jury, in ruling that the defendants were liable for every delay in shipping the engines, however occasioned; for it was no part

of the duty or obligation of the defendants to make alterations in the ship, which did not belong to them, so as to fit her to receive their goods. In the case of an ordinary contract for the carriage of goods in a ship, it is the duty of the shipowner to have the ship in a fit condition for taking them on board. The shipper brings the goods to the quay, and the shipowner takes them on board from there. He is responsible for risks of stowage, the sufficiency of tackle, and so forth. The 5th clause of the agreement modified this responsibility, which would otherwise have fully devolved upon the plaintiff, to this extent, that all goods exceeding 20 cwt. in weight were to be put on board and stowed by the defendants. But that clause did not require the defendants to make alterations in the ship, in order to fit her for receiving the goods when brought on board; nor did it relieve the plaintiff from his implied promise that the ship was fit for their reception. Lord Ellenborough, C. J., in delivering the judgment of this Court in *Lyon v. Mells*, 5 East 428, 437, said, "In every contract for the carriage of goods between a person holding himself forth as the owner of a lighter or vessel ready to carry goods for hire, and the person putting goods on board or employing his vessel or lighter for *215] that purpose, it is a *term of the contract on the part of the carrier or lighterman, *implied by law*, that his vessel is tight and fit for the purpose or employment for which he offers and holds it forth to the public: it is the very foundation and immediate substratum of the contract that it is so: the law presumes a promise to that effect on the part of the carrier without any actual proof; and every reason of sound policy and public convenience requires it should be so." As the ship, here, required alteration, before she could stow the engines, the plaintiff committed a breach of this implied promise, and he, not the defendants, was responsible for the consequent delay. [WIGHTMAN, J.—The bargain was that the defendants were to stow the engines. It turned out that they could not be stowed unless the ship was altered. Both parties knew, before the agreement was made, that some alteration would be requisite.] Had it been intended that the defendants were to make the alterations, there would have been an express stipulation in the agreement to that effect.

Mellish was heard in reply on the point as to the misdirection.

Cur. adv. vult.

BLACKBURN, J., now delivered the judgment of the Court.

This was a case tried before me at the last Liverpool Assizes. The plaintiff Blech was charterer of the steam ship *William France* for six months. The plaintiff had made an agreement in writing with the defendants to carry in the ship some engines and tenders to Barcelona. *216] In that agreement was contained a clause that, if the engines could not go through the hatchways, the agreement was to be void. Some discussion arose between the plaintiff and defendants as to this agreement, from which it appears that it was known to both parties that it was doubtful whether the engines could be got on board without making some alterations in the ship; but that it was anticipated that the necessary alterations would consist in removing some beams, and would not be great, or occupy much time. The result of these negotiations was, that the former agreement between

the plaintiff and defendants was cancelled and a fresh agreement in writing drawn up, on the construction of which the present cause depends. It was in the following terms: "The following conditions have this day, 5th December, 1859, been agreed upon between Messrs. Balleras & Co., of Liverpool, and Messrs. Blech & Co., the charterers of the screw steamer William France, also of Liverpool. 1st. That Messrs. Blech & Co. should lay the steamer William France on the berth in Liverpool, for Barcelona, on her arrival here from London, after having discharged her cargo. 2d. The said steamer should not be required to lie on her berth longer than ten days. 3d. That she should make the voyage from here to Barcelona for the lump sum of 650*l.*, charterers to pay all charges. 4th. That Messrs. Balleras should load in the steamer two engines and tenders complete, for 240*l.*: freight to be paid here, on delivery of bills of lading without any deduction for interest or insurance. 5th. Such of the above goods that weigh above 20 cwt. shall be put in the steamer, stowed, taken out, and landed at the shipper's risk and *expense. 6th. The said goods should be taken out of the steamer, as soon as the captain is ready to [*217 deliver them, in five days, Sunday excepted, and 20*l.* sterling demurrage to be paid by the shipper or receiver of the above named goods, for every day she is detained over and above five days. 7th. That the steamer should be entered in the joint names of Messrs. Blech & Co. and Balleras & Co., so that the latter may assist to get cargo. 8th. Any surplus of freight above 650*l.* should be divided between Messrs. Balleras & Co. and Blech & Co., and also any loss which may result. 9th. That the said steamer should guarantee to carry 480 tons dead weight, besides 40 tons of coal in the bunkers. 10th. The bills of lading for the whole cargo of the said steamer to be signed at the office of Messrs. Blech & Co. 11th. The steamer to be consigned, at Barcelona, to the friends of Messrs. Balleras & Co., paying 2 per cent. commission on the above freight." The action was brought, on the 2d clause of the agreement, for detaining the ship longer than ten days. One point made at the trial was that the agreement was a partnership agreement on which no action lay at law; and leave was reserved to enter a nonsuit if this was so. The defendants also complain of misdirection; and it is necessary to state so much of the evidence as will explain the direction complained of. The William France arrived at Liverpool; she was put on the berth. The beams in the hatchway were, by consent of the owner of the William France, removed, at the joint expense of the plaintiff and defendants; and the engines were brought alongside. They exceeded 20 cwt., so as to come within the provisions contained in the 5th clause of the agreement. *It was found that, notwithstanding the removal of the beams, the engines could not go down the hatchway. This was before [*218 the ten days had expired. The consent of the owner of the William France was given to widen the hatchway, so as to let the engines go down in the hold; but he made it a condition on his giving his consent, that the ship should be made right before she sailed, to the satisfaction of Lloyd's surveyor. There was a conflict of testimony as to much of what ensued: but it was clear that the ship did not sail till twenty-three days after she lay upon her berth, and there was evidence on which the jury were warranted in finding that the ship was detained

during the period beyond the ten stipulated days, for the purpose, first, of cutting the hatchways in order to put those parts of the engines which exceeded 20 cwt. into the ship, and afterwards for the purpose of making good the ship to the satisfaction of Lloyd's surveyor. The jury were told that the shippers, that is the defendants, had, by the 5th clause of the agreement, undertaken that these parts of the engine should be put on board at their risk and expense; without any saving clause to protect them, in the event of that proving to be difficult; and that, therefore, any detention of the ship occasioned by alterations in the ship necessary to effect this was detention by the defendants. The jury found for the plaintiff for thirteen days' detention at 20*l*. a day, making 260*l*. A rule nisi has been obtained to enter a nonsuit on the point reserved; or for a new trial on the ground of misdirection of the learned Judge who tried the cause, in holding that the defendants were liable for any delay of the ship caused during *219] the alterations needful to *take the engines on board. The case was argued in the Sittings after this Term. My brother Wightman and I heard the whole of the argument. My brother Crompton heard that portion of the argument which related to the point reserved; but not the argument as to misdirection. My brother Hill heard the argument as to the misdirection, but not the argument as to the point reserved. Both points depend upon the construction of the document. It may be that a partnership to some extent is constituted by the agreement as to the freight; but we think that, on the true construction, the 2d clause is an agreement between the shippers (the defendants) and the plaintiff (the person who alone was interested in the speedy sailing of the ship) that the plaintiff's ship should not be required by the defendants to lie on her berth more than ten days; and that this agreement was collateral to and independent of any partnership in the freight, the damage arising from any breach of it being solely to the plaintiff, and in no way to be brought into the account of profit and loss. If that be so, the action will lie, and there is no ground for entering a nonsuit. The question as to misdirection remains for consideration. It was contended on the part of the defendants that it was the implied agreement of the plaintiff, as furnishing the ship, that she should be made fit to receive on board the engines; in which case the detention was for the purpose of supplying that which the plaintiff had engaged to supply, and could not be said to be caused by the defendants. If this was so there was a misdirection, and one on a point going to the whole merits. But we think that the parties, knowing that there was a doubt as to whether *220] *the engines would go on board, and that there might be difficulty and expense in shipping them, have agreed that the shippers should take on themselves all the expense and risk of putting them in and stowing them. If it should prove impossible to put them in the ship, the defendants, having taken upon themselves absolutely to do so, must pay damages for not fulfilling their contract. If there is delay or expense incurred in fulfilling it, it is incurred by the defendants. We think therefore that the ruling complained of was right, and the rule must be discharged on both grounds.

Rule discharged.

END OF TRINITY VACATION.

CASES

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

Michaelmas Term,

XXIV. VICTORIA. 1860.

The Judges who usually sat in Banc in this Term, were:

COCKBURN, C. J.

HILL, J.

WIGHTMAN, J.

BLACKBURN, J.

BAMFORD *v.* TURNLEY. *Nov. 5.*

[Reported, in the Queen's Bench and in the Exchequer Chamber on error from that Court, 8 B. & S. 62 (E. C. L. R. vol. 113).]

**Ex parte* The Mayor of BIRMINGHAM. *Nov. 8.* [*222]

The Municipal Corporations Reform Act, 5 & 6 W. 4, c. 76, s. 57, enacts "That the mayor for the time being of every borough shall be a justice of the peace of and for such borough, and shall continue to be such justice of the peace during the next succeeding year after he shall cease to be mayor;" "and such mayor shall, during the time of his mayoralty, have precedence in all places within the borough."

Held, that this section refers to social, not magisterial, precedence; and therefore does not entitle a mayor, during his mayoralty, to take precedents and to preside at all meetings of the borough justices, held in the borough, at which a chairman is required.

SIR W. ATHERTON, Solicitor-General, moved on behalf of Thomas Lloyd, the Mayor of the borough of Birmingham, for a rule calling on the justices of the peace for that borough to show cause why a

mandamus should not issue, commanding them to permit him, as Mayor for the time being, to take precedence and to preside at all meetings of the justices to be held within the borough, at which a chairman should be required.

The affidavits showed that in 1839 a separate commission of the peace was granted to the borough; that in 1859 the justices of the borough refused to allow the then Mayor to preside at their meetings; and that, in the present year, they had refused to permit the applicant to preside, as Mayor for the time being, at the gaol sessions, or any official meetings of the justices, and another magistrate had been voted to the chair.

The *Solicitor-General*, for his rule.—The question whether the Mayor has the right of precedence which he claims, turns upon the construction to be given to The Municipal Corporations Reform Act, 5 & 6 W. 4, c. 76, s. 57, which enacts, "That the Mayor for the time *223] being of every borough shall be a justice of the peace of and for such borough, and shall continue to be such justice of the peace during the next succeeding year after he shall cease to be Mayor;" "and such Mayor shall, during the time of his mayoralty, have precedence in all places within the borough." Under this section the Mayor is entitled to precedence at the meetings of the justices at which he is present as a justice, no less than in all other places at which he is present while he holds his office. There is nothing in the language of the statute to limit the meaning of precedence to social precedence. [WIGHTMAN, J.—Is there any authority for the issuing of a mandamus of the kind you ask for?] In *Ex parte Farnall*, (a) this Court made absolute a rule for a mandamus to the directors and guardians of the parish of St. Marylebone, to admit the applicant, an Inspector appointed by the Poor Law Board, to attend their meetings, in pursuance of stat. 10 & 11 Vict. c. 109, s. 20. (b) [WIGHTMAN, J.—In that case the defendants had prevented the applicant from performing his statutory duty to attend the meetings.] Sect. 57 of the Municipal Corporations Reform Act imposes upon the Mayor the duty of presiding, *ex officio*, over the borough justices. [WIGHTMAN, J.—The Mayor may have had no previous experience as a justice; and it would be very inconvenient if an inexperienced person had the right to preside over others better qualified.]

*224] COCKBURN, C. J.—There can be no rule. We think *that the section in question of the Act of Parliament applies only to the social, not to the magisterial, precedence of the Mayor.

WIGHTMAN, HILL, and BLACKBURN, Js., concurred.

Rule refused.

(a) Not reported. The rule nisi was obtained on 23d May, and made absolute on 11th June, 1856, no cause being shown.

(b) Which enacts, that the inspector "shall be entitled to" "attend every Board of guardians and every parochial and other local meeting held for the relief of the poor, and to take part in the proceedings, but not to vote at such Board or meeting."

SCHLUMBERGER v. LISTER. Nov. 9.

[Reported, 2 E. & E. 870 (E. C. L. R. vol. 105).]

THE QUEEN, on the Prosecution of the Guardians of the Poor of the STRAND Union, Respondents, v. The Overseers of the Poor of the Parish of St. GILES IN THE FIELDS, Appellants.
Nov. 10.

On 17th October, 1854, J. R., who was then eighteen years old and living, unemancipated, with his father, T. R., in the parish of A. in the S. Union, was removed as a lunatic pauper to an asylum, where he had since continued. At that time both T. R. and J. R. had resided in A. for more than the five next preceding years. T. R. continued to reside there till 1857, when he left, and had not since returned.

T. R.'s settlement, both on and since 17th October 1854, was in the parish of G. J. R. was maintained in the asylum from that date, at the cost of the S. Union, until, it being discovered that T. R. had left A., an order of justices was, on 11th October, 1859, made under stat. 16 & 17 Vict. c. 97, s. 97, adjudging J. R. to be settled in G., and ordering G. to pay the preceding twelve months' expenses of his maintenance, and a weekly sum for his future support. Sect. 102 of that Act provides that all expenses incurred for the removal, maintenance, &c., of a pauper lunatic removed to an asylum, "who would at the time of his being conveyed to such asylum" "have been exempt from removal to the parish of his settlement" "by reason of some provision in" stat. 9 & 10 Vict. c. 66, "shall be paid by the guardians of the parish wherein such lunatic shall have acquired such exemption," "and where such parish shall be comprised in any Union the same shall be paid by the guardians, and be charged to the common fund of such Union;" "and no order shall be made under any provision" "in this" "Act on the parish of the settlement in respect of any such lunatic pauper."

On a case stated for this Court on an appeal to Sessions by G. against the order of 11th October 1859: Held, that stat. 16 & 17 Vict. c. 97, s. 102, applied, and the order was therefore bad. That J. R. was, at the time of his being conveyed to the asylum, exempt from removal to G. by reason of a provision in stat. 9 & 10 Vict. c. 66, with which the amending statute 11 & 12 Vict. c. 111, was to be read as one: and had himself, though not *sui juris*, acquired such exemption in A.

CASE stated by consent and by Judge's order, under stat. 12 & 13 Vict. c. 45, on an appeal to Sessions *against an order of removal, dated 11th October, 1859, by which James Randall, [*225 a pauper lunatic, was adjudged to be settled in the parish of St. Giles in the Fields, and the Guardians of the poor of that parish were ordered to pay 34*l.* 10*s.* 11*d.* to the guardians of the Strand Union, being the amount of expenses incurred by the latter in the maintenance of the lunatic within twelve calendar months before the making of the order; and also 10*s.* weekly for the future support of the said lunatic in an asylum.

On the 17th October, 1854, the said James Randall, who was then eighteen years of age, and living, unemancipated, with his father, Thomas Randall (who is still alive), in the parish of St. Anne, Westminster, in the Strand Union, having become insane, was removed to the county lunatic asylum, under the authority of the Act in that behalf, and has been maintained therein ever since as a pauper lunatic. He never gained a settlement in his own right. At the time of his removal, his father was settled in the parish of St. Giles, which settlement he still retains. The father and the lunatic son, who lived with him as part of his family, had each resided in St. Anne's parish for five years and upwards next before 17th October, 1854. The father continued to reside in that parish until three years ago, when he left the parish without any intention of returning, and has not since returned. After the lunatic had been sent to the asylum, and down to 15th September, 1859, his maintenance was charged to the common fund of the Strand Union; but after that day, on which it was discovered that his father had left St. Anne's parish, the costs of such

maintenance were, as to the twelve months preceding the said 15th September, transferred and for the future *charged to the parish of St. Anne. On 11th October, 1859, the order appealed against was made, under stat. 16 and 17 Vict. c. 97, s. 97. The part of the expenses ordered to be paid, which was incurred between 15th September and 11th October, 1859, amounted to 2*l*.

It was contended, on the part of the appellants, that the lunatic was, at the time of his being conveyed to the asylum, exempt from removal to the parish of his settlement, by reason of a provision in stat. 9 & 10 Vict. c. 66; that, under 16 & 17 Vict. c. 97, s. 102, the order ought not to have been made and that the lunatic ought to continue to be maintained in the asylum out of the common fund of the Strand Union; and that, if any such order ought to have been made, it ought not to have directed the payment of expenses incurred before the date of it; or at all events, ought not to have directed the payment of expenses incurred before the 15th September, 1859.

On the part of the respondents it was contended that, if the lunatic was exempt from removal as alleged by the appellants, he, being, as the respondents contended, unemancipated when his father left the parish of St. Anne, and having no other settlement than that of his father, ceased to be exempt from removal by reason of any provision of stat. 9 & 10 Vict. c. 66; and that the order was properly made in its terms, upon the parish wherein the lunatic was settled.

The questions for the opinion of the Court were, First, whether any order could be lawfully made on the parish of St. Giles, for payment of expenses for the maintenance, &c., of the lunatic in the asylum; Secondly, whether, assuming such an order might have been made, *227] any order might be made for the payment of past *expenses; Thirdly, whether all the expenses incurred during the twelve months next before the order, or such part only as were incurred since 15th September, 1859, might be directed to be paid.

If the first question was answered in the negative, the order was to be quashed. If that question was answered in the affirmative, the order was to be confirmed or amended according as required by the answers to the other questions.

Poland, for the respondents.—First, the order was rightly made on the appellants. By stat. 16 & 17 Vict. c. 97, s. 97, justices are empowered at any time to inquire into and adjudge the settlement of a pauper lunatic who is in confinement in an asylum, and to order the guardians of the union or parish of settlement to pay the expense incurred for the lunatic's maintenance and otherwise. Then follows sect. 102, upon the construction of which the question in the present case depends, and by which it is enacted "That all the expenses incurred since 29th September, 1853, or hereafter to be incurred, in and about the examination, bringing before a justice or justices, removal, lodging, maintenance, medicine, clothing, and care of a pauper lunatic heretofore or hereafter removed to an asylum, registered hospital, or licensed house under the authority of this or any other Act, who would, at the time of his being conveyed to such asylum, hospital, or house, have been exempt from removal to the parish of his settlement or the country of his birth by reason of some provision in" stat. 9 & 10 Vict. c. 66, "shall be paid by the guardians of the parish wherein

such lunatic shall have acquired such exemption if such parish be subject to a separate board *of guardians, or by the overseer [*228 of such parish where the same is not subject to such separate board, and where such parish shall be comprised in any Union the same shall be paid by the guardians, and be charged to the common fund of such Union so long as the cost of the relief of paupers rendered irremovable by the last-mentioned Act shall continue to be chargeable upon the common funds of Unions; and no order shall be made under any provision contained in this or any other Act on the parish of the settlement in respect of any such lunatic pauper during the time that the above mentioned charges are to be paid and charged as herein provided; and sect. 5 of" stat. 12 and 13 Vict. c. 103, "shall be repealed." This section does not apply at all to such a case as the present, where the lunatic pauper is an unemancipated child; but only to cases where the lunatic has acquired the status of irremovability, under stat. 9 & 10 Vict. c. 66, in his or her own capacity, and not through a father or a husband. The words "wherein such lunatic shall have acquired such exemption" point to a direct acquisition by the lunatic in person. [BLACKBURN, J.—Does not a child living with his father when the father becomes irremovable, also become exempt from removal, "by reason of some provision in stat. 9 & 10 Vict. c. 66"?] No: the child is rendered irremovable, in such a case, by the later Act, 11 and 12 Vict. c. 111, s. 1. And it becomes exempt from removal solely in consequence of the father's residence for five years in a parish; the length of the child's residence there while unemancipated, which in the present case happens to have extended to five years, being immaterial. But, further: assuming that stats. 9 & 10 Vict. c. 66 and 11 & 12 Vict. c. 111 are to be read as one, and that an unemancipated *child, or a wife, can be said to acquire the status of irremov- [*229 ability by reason of the father or husband becoming irremovable; that status is only temporary, and conditional upon its retention by the father or husband: *Regina v. St. Ann, Blackfriars*, 2 E. & B. 440 (E. C. L. R. vol. 75); *Regina v. Cudham*, 1 E. & E. 409 (E. C. L. R. vol. 102). Now the case finds that the father of the lunatic has left St. Anne's parish; so that, should he return there, he would be removable. It follows that his son, the lunatic, is now removable. [BLACKBURN, J.—Stat. 16 & 17 Vict. c. 97, s. 102, renders it immaterial whether or not the lunatic is now removable. The section applies if, as in the present case, he was exempt from removal to the parish of his settlement at the time of his being conveyed to the asylum.] In order that the section may receive a reasonable construction, the conveyance of the lunatic to the asylum may be supposed to take place, constructively, from week to week; the order under stat. 16 & 17 Vict. c. 97, directing the payment for his maintenance, &c., to be made week by week. Light is thrown on the intention of the Legislature by the language of the earlier statute 11 & 12 Vict. c. 110, an Act passed for one year but afterwards continued; by sect. 3 of which it was enacted that, for the year in question, "all the costs incurred in the relief, as well medical as otherwise, of any poor person, who, not being settled in the parish where he resides, shall, by reason of some provision in" stat. 9 & 10 Vict. c. 66, "be or become exempted from

the liability to be removed from the parish where he resides, shall, where the said parish shall be comprised in any "Union," "be charged to the common fund of such Union, so long as such person shall continue to be *so exempted." And stat. 12 and 13 Vict. c. 103, *230] s. 5, for which stat. 16 & 17 Vict. c. 97, s. 102, is now substituted, enacted, "That all the costs and expenses incurred or hereafter to be incurred, since the 25th day of March last, in and about the obtaining any order of justices for the removal and maintenance of a lunatic pauper who shall have been or shall be removed under any such order to any asylum, licensed house, or registered hospital, and who, if not a lunatic, would have been exempt from removal by reason of some provision in" stat. 9 & 10 Vict. c. 66, "shall, until the time when the provisions hereinbefore contained shall cease, be borne by the common fund of the Union comprising the parish wherein such pauper lunatic was resident at the time when such lunatic pauper was so removed to such asylum, licensed house, or registered hospital, notwithstanding the order for the payment thereof shall have been made upon the overseers of such parish, or the parish of the settlement, or upon the treasurer or guardians of the Union in which either parish shall be comprised." Stat. 16 & 17 Vict. c. 97, s. 102, is the first enactment which, even *prima facie*, appears to impose a permanent liability on the parish from which the lunatic was irremovable at the time he was conveyed to the asylum. [BLACKBURN, J.—The last enactment was passed, no doubt, in order to remedy the restricted operation of stat. 12 & 13 Vict. c. 103, s. 5; which statute, as was decided in *Regina v. St. Leonards, Shoreditch*, 14 Q. B. 840 (E. C. L. R. vol. 68), applied only where the lunatic had been removed under an order of justices. The new Act applies to all removals under the authority of an Act of Parliament, and points out the time of *231] *removal as that which is to determine the liability of the parish of residence.] Next, as to the expenses which the order might properly direct to be paid. [*Keane*, *contra*, here stated that he gave up the last two points relied upon by the appellants.]

Keane, for the appellants.—The order is bad. Stat. 9 & 10 Vict. c. 66, s. 1, enacts that "no person shall be removed" "from any parish in which such person shall have resided for five years next before the application for" a warrant for removal. An unemancipated child, living with its father, is a "person," and can acquire the status of irremovability through him: *Regina v. Elvet*, 2 E. & E. 266 (E. C. L. R. vol. 105). The lunatic in the present case had, therefore, at the time of his being conveyed to the asylum, which is the only time to be considered in construing stat. 16 & 17 Vict. c. 97, s. 102, acquired, in St. Anne's parish, exemption from removal. The only point on which the respondents can rely is, that the exemption was not acquired by reason of some provision in stat. 9 & 10 Vict. c. 66, because the lunatic was irremovable by reason of the later Act, 11 & 12 Vict. c. 111. That Act, however, was passed merely, as the preamble states, in order to remove doubts which had arisen from the generality of the expressions in one of the provisoes of the former; which proviso it substantially re-enacts, with a slight change in the phraseology. The two Acts must clearly be read together as one. (He was then stopped by the Court.)

COCKBURN, C. J.—The whole force of the argument for *the respondents rests on the assumption that the proviso re-enacted [*282 by stat. 11 & 12 Vict. c. 111, s. 1, is not to be considered as part of stat. 9 & 10 Vict. c. 66; for if that is so, the lunatic was not exempt from removal from St. Anne's parish by reason of some provision in stat. 9 & 10 Vict. c. 66, and stat. 16 & 17 Vict. c. 97, s. 102, did not, therefore, apply. I, however, think that the two statutes, 9 & 10 Vict. c. 66, and 11 & 12 Vict. c. 111, are to be read as one: the latter merely substituting, for a proviso in the former, another couched in clearer and less general language, but identical in purport. The order of removal was therefore bad, as being in contravention of stat. 16 & 17 Vict. c. 97, s. 102; and it must be quashed.

(WIGHTMAN and HILL, Js., were absent.)

BLACKBURN, J.—I am of the same opinion. By stat. 16 & 17 Vict. c. 97, s. 102, it is enacted as follows. [His Lordship read the section.] One question therefore is whether this lunatic pauper had, at the time of his being conveyed to the asylum, acquired exemption from removal, by reason of some provision in stat. 9 & 10 Vict. c. 66. Now sect. 1 of that statute enacted that no person should be removed from a parish after residing in it for five years; and contained a proviso which was intended to mean that, whenever any person should have a wife or children having no other settlement than his or her own, such wife and children should be removable or not removable from any parish or place according as he or she would or would not be removable therefrom. This meaning, however, being somewhat vaguely expressed, stat. 11 & 12 Vict. c. 111, was passed with the simple *object of substituting a clearer form of proviso to [*283 precisely the same effect. I think, therefore, that the two statutes must fairly be read as one. The remaining question is, whether the lunatic, being then an unemancipated child, living with an irremovable father, could be said, at the time of his being conveyed to the asylum, to have himself "acquired" the exemption from removal, within the meaning of stat. 16 & 17 Vict. c. 97, s. 102, he being then not *sui juris*. As to this, I agree with Mr. Keane that he had then "acquired" the exemption; and I think that *Regina v. Elvet*, 2 E. & E. 266 (E. C. L. R. vol. 101), is an authority in favour of that view. Whether it was the intention of the Legislature that a parish or union should continue to be chargeable with the maintenance of a lunatic pauper child after its father had ceased to be irremovable therefrom, or whether this is a *casus omissus* in the Act, it is not for us to determine.

Order quashed.

SOMMERVILLE *v.* MIREHOUSE. Nov. 18.

[Reported, 1 B. & S. 652 (E. C. L. R. vol. 101).]

***234]** ***EMBLETON, Appellant, v. BROWN, Respondent.** *Nov. 14.*

The part of the sea shore comprised between high and low water mark forms part of the body of the adjoining county, the justices of which, and not the Admiralty, have jurisdiction to take cognisance of offences there committed, whether or not committed when the shore is covered with water.

CASE stated by justices, under stat. 20 & 21 Vict. c. 43.

At the Petty Sessions held in and for the east division of Croquetdale Ward, in the county of Northumberland, on 8d March, 1860, an information came on for hearing before the justices, of which the following is a copy, so far as is material.

"Northumberland } The information of George Embleton, of Wark-
(to wit.) } worth, in the county of Northumberland, made
upon oath before," &c., "on," &c.; "who saith, that Henry Brown, of
Cresswell, in the said county, fisherman, on 19th November last, at
the township of Amble, in the parish of Warkworth, in the county
aforesaid, did then and there unlawfully attempt to take certain fish,
to wit, salmon trout, in certain water there called The Stell Fishery,
in which His Grace the Duke of Northumberland then had a private
right of fishery for salmon and fish of the salmon kind, and such
water not running through or being in any land adjoining or belong-
ing to the dwelling-house of the said Duke; contrary to the form of
the statute in such case made and provided.

"Sworn," &c.

This information was laid under stat. 7 & 8 G. 4, c. 29, s. 34. The prosecutor and the above named respondent (hereinafter called "the defendant") appeared at the hearing, by adjournment, on 7th April, 1860. The *facts were admitted by the defendant to be correctly
***235]** laid in the information, with this exception, that the place where the offence was committed was the sea shore, between high and low water mark at ordinary tides, and was, at the time the offence was so committed, covered by the sea. At low water this place was dry land.

Upon this evidence it was contended, on the part of the prosecutor, that, notwithstanding that circumstance, the place where the offence was committed, was within the body of the county, and therefore within the jurisdiction of the justices. On the part of the defendant it was argued that it was only within the jurisdiction of the justices when it was low water, but when the tide was full it then ceased to be so, and was then within the jurisdiction of the Admiralty.

Upon this state of doubt, the justices dismissed the information for want of jurisdiction.

The question for the opinion of the Court was, whether their determination that they had no jurisdiction was or was not right in law.

If the Court should be of opinion that their determination was wrong, the justices requested the Court to remit the matter to them with the opinion of the Court thereon accordingly; or to make such other order in relation to the matter as to the Court should seem meet.

Manisty, for the appellant.—The question is whether the jurisdic-

tion of the justices of a county extends over that portion of the sea shore, adjoining the county, which is between high and low water mark. *Regina v. Musson*, 8 E. & B. 900 (E. C. L. R. vol. 92), shows that the portion of the sea shore in *question is within the body [*236 of the county, although there is no *prima facie* presumption that it forms part of the parish coming down to the shore. The justices therefore, in the present case, clearly had jurisdiction to take cognisance of the offence. Stat. 7 & 8 G. 4, c. 29, s. 34, under which the information was laid, makes it an offence punishable by conviction to "unlawfully and wilfully" "attempt to take or destroy any fish in any water" "in which there shall be any private right of fishery": and it must be taken upon the facts stated in the case that the Duke of Northumberland had a private right of fishery in the part of the sea where the respondent took the salmon trout. [COCKBURN, C. J.—Assuming the place in question to be open sea, could the Crown have granted, at any time, an exclusive right of fishery in it?] Before *Magna Charta* the Crown had power to make such a grant. *Bagot v. Orr*, 2 B. & P. 472, shows that there may be an exclusive right of fishing for salmon in the open sea as far as low water mark. The only matter for the consideration of the Court is whether or not the sea shore between high and low water mark is within the body of the adjacent county: if so, the Admiralty can have no jurisdiction over it. The law is expressly laid down to that effect in 4 Inst. 134, where Lord Coke says that to the objection "That whereas the conusance of all contracts and other things done upon the sea belongeth to the admirall jurisdiction, the same are made triable at the common law, by supposing the same to have been done in Cheapside, and such places," the answer is that "By the lawes of this realm the Court of the admirall hath no conusance, power, or jurisdiction of any manner *of contract, plea, or querele within any [*237 county of the realm, either upon the land or the water: but every such contract, plea, or querele, and all other things rising within any county of the realm, either upon the land or the water, and also wreck of the sea, ought to be tried, determined, discussed, and remedied by the lawes of the land, and not before, or by the admirall nor his lieutenant in any manner. So as it is not materiall whether the place be upon the water *infra fluxum et refluxum aquæ*: but whether it be upon any water within any county."

No counsel appeared for the respondent.

COCKBURN, C. J.—We must assume that the justices were satisfied of the fact that the Duke of Northumberland had the exclusive right of fishing in the sea at the place where the offence was committed; and that the only question submitted to us is whether or not they had jurisdiction to take cognisance of offences committed in the part of the sea, adjoining their county, comprised between high and low water mark. *Regina v. Musson*, 8 E. & B. 900 (E. C. L. R. vol. 92), appears to be a direct authority that such part of the sea is within the body of the adjoining county. It follows that the justices had, and ought to have exercised, jurisdiction in the matter; which must therefore be remitted to them.

(WIGHTMAN, J., was absent.)

HILL and BLACKBURN, Js., concurred.

Judgment for the appellant. Case remitted to the justices.

In *Mahler v. Transportation Co.*, the action was to recover damages for the death of plaintiff's intestate caused by the negligence of the defendant, whose steamer ran into and sunk the sloop upon which intestate was engaged, and he was drowned. The Supreme Court dismissed the case on the ground that, as the collision occurred beyond low-water mark, they had no jurisdiction: 45 Barb. (1865) 226. This decision was reversed on appeal, after a full consideration of the subject, and the boundaries of the respective counties were held to extend to the extreme limits of the state jurisdiction over its adjacent waters: 8 Tiffany (N. Y. 1866) 352. And an indictment for an offence committed on a steamboat

whilst it was in Long Island Sound, opposite the county of Suffolk, must be brought in that county: *Manley v. The People*, 3 Seld. (N. Y. 1852) 295.

The determination of the jurisdiction is a mixed question of law and fact, which should be submitted to a jury under instruction from the court: *United States v. Jackalow*, 1 Black (U. S. Sup. Ct. 1861) 484.

The cession of admiralty and maritime jurisdiction over inland bays and navigable streams to the general government does not deprive the states of their residuary powers of legislation and dominion: *United States v. Bevans*, 3 Wheat. (1818) 336.

*CLEMENTS, Appellant, v. SMITH, Respondent. Nov. 14. [*288

The General Turnpike Act, 3 G. 4. c. 126. enacts, by sect. 32, "that no toll shall be demanded or taken" "on any turnpike road, for" "any horse, beast or other cattle or carriage employed in carrying or conveying, having been employed only in carrying or conveying on the same day," "any hay, straw, fodder for cattle, and corn in the straw, which has grown or arisen on land or ground in the occupation of the owner of any such hay, straw, fodder or corn in the straw, potatoes or other agricultural produce, and which has not been bought, sold or disposed of, nor is going to be sold or disposed of."

A horse and cart passed through a toll-gate, carrying threshed barley, which had grown on land in the occupation of the owner, to a mill to be ground into meal for feeding the owner's pigs. They reappeared on the same day laden with barley-meal obtained from the mill, the produce of another parcel of barley grown by the same owner on the same land, and previously sent to be ground into meal for the same purpose. The horse and cart had not been employed in any other way on the same day. Held, that they were exempt from toll under the above enactment on each journey: for that both the barley and the barley-meal came within the description of "fodder for cattle."

CASE stated by justices, under stat. 20 and 21 Vict. c. 43.

At a Petty Sessions holden at Rochford, in the county of Essex, on 23d February, 1860, an information was preferred by the appellant, a toll collector, against the respondent, charging that he, on 16th January, 1860, at Hoekley, in the said county, did claim and take the benefit of a certain exemption from toll payable at a certain turnpike gate there situate; he then and there not being entitled to the same; contrary to the form of the statute in such case made and provided.

By stat. 3 Geo. 4, c. 126, s. 36 (The General Turnpike Act), it is enacted "That if any person or persons shall, by any fraudulent or collusive means whatsoever, claim or take the benefit of any exemption from toll or from overweight, or for using any additional horse or horses, or of any other exemption or exemptions whatsoever in this Act contained, every such person shall for every such offence forfeit and pay any sum not exceeding 5*l*.; and in all cases the proof of exemption shall be *upon the person claiming the same." [*289

By sect. 32 it is enacted "That no toll shall be demanded or taken by virtue of this or any other Act or Acts of Parliament, on any turnpike road, for" (inter alia) "any horse, beast or other cattle or carriage employed in carrying or conveying, having been employed only in carrying or conveying on the same day" (inter alia) "any hay, straw, fodder for cattle, and corn in the straw, which has grown or arisen on land or ground in the occupation of the owner of any such hay, straw, fodder or corn in the straw, potatoes or other agricultural produce, and which has not been bought, sold or disposed of, nor is going to be sold or disposed of."

The appellant proved that the respondent, on the day in question, came to one of the toll gates of the Essex Turnpike Trust with a horse and cart, and claimed to pass, and did pass, through without payment of toll, alleging that he was carrying threshed barley to the mill to be ground into meal for his master's pigs; and that, on his return laden, he again claimed to pass, and did pass, through the same gate without payment of toll, on the ground that he was laden with barley-meal to be used as food for his master's pigs. It was proved on behalf of the respondent that, at the time of the alleged offence, he was the servant of a Mr. Wood, an occupier of land at Rochford and Hawkwell; that the barley which the respondent was conveying was

grown on his master's farm, whence it was taken to the mill to be ground into meal for feeding pigs upon the farm; that, on his return from the mill, his cart was laden with barley-meal delivered to him at the mill as the produce of another parcel of his master's barley, grown on the said farm, which had been previously sent to be ground; that

*240] *the said meal was afterwards actually consumed by his said master's pigs on his said land; and that the said horse and cart had not been employed in any other way during the same day.

On these facts the justices decided that the barley and barley-meal were both "fodder for cattle," within the meaning of stat. 3 G. 4, c. 126, s. 32; and further, that, if not "fodder for cattle," they were "agricultural produce" grown on the lands of the owner, and not bought, sold, or disposed of, or going so to be, within the meaning of the same section; and as such were exempt from toll. And on these grounds they dismissed the said information.

The questions for the opinion of the Court were:

1st. Can threshed corn be deemed "fodder for cattle" or "agricultural produce" within the exemption given by stat. 3 G. 4, c. 126, s. 32?

2d. Is threshed corn, grown on the farm and transported to be ground into meal, and in its new form returning to the farm to be used as food for cattle, exempt from toll both going and returning, or either way?

3d. Is "fodder for cattle" exempt from toll when in transit, not for consumption or store, but to be submitted to a mechanical process to render it fitter for use as fodder?

And, lastly, whether, on the facts proved as stated above, the justices were right in law in dismissing the said information?

Edmund Round, for the appellant.—The justices have put a wrong construction upon sect. 32 of the statute. Neither barley or barley-meal fall within any of the exemptions from toll there enumerated. They are *241] clearly *neither hay, straw, or corn in the straw; nor are they fodder for cattle, the mention of which between "straw" and "corn in the straw" shows that the Legislature had in contemplation fodder ejusdem generis. [BLACKBURN, J.—Does "fodder" mean that which already is, or that which is intended to be, food for cattle?] It is defined in Johnson's Dictionary as "dry food stored up for cattle against winter." [BLACKBURN, J.—That definition appears too limited. Rye grass cut in the field and brought home for immediate consumption by cattle is fodder. COCKBURN, C. J.—So are vetches. BLACKBURN, J.—Corn in the straw would not be fodder.] In some counties it might be, as in Lincolnshire, where horses are often fed with unthreshed oats. At all events, assuming that barley is fodder, barley-meal is not; being a manufactured article. [COCKBURN, C. J.—The same might be said of hay or chopped straw.] The exemption must end somewhere. Would a baker, carrying loaves of bread, be exempt on the ground that bread is corn? Or would oilcake be fodder for cattle? [HILL, J.—In *Higginbotham v. Perkins*, 8 Taunt. 795 (E. C. L. R. vol. 4), it was held that these exemptions from toll are to be construed beneficially in favour of agriculture.] The statute now under consideration was not, like some of the earlier Acts, passed for the benefit of agriculture, but simply because, as the preamble recites,

"the laws" "in force for the general regulation of turnpike roads" were "found to be ineffectual and" required "amendment." [COCKBURN, C. J.—You say that when the barley first passes through the toll-gate it is not being carried as food for cattle, but as something to be converted into such food. But when it comes back in the shape of barley-meal, you say that it has passed into *a further stage than being produce "which has grown or arisen on land."] In the present [*242 case it is found that the barley-meal with which the defendant came back was made from different barley to that with which he first passed through. In sect. 16 of the Act, "hay, straw, fodder or corn unthreshed" are specified, not "fodder for cattle." The Legislature, in passing sect. 32, must have intended the toll-gate keeper to have reasonable means of ascertaining, from ocular inspection, whether the exemptions attached or not upon things passing the gate. [BLACKBURN, J.—How can the toll-keeper tell from inspection upon whose land hay, straw, or corn have grown? He must take the carter's word as to who is the owner, and whence they come.] Had the Legislature supposed that fraud would be perpetrated in that respect, they would, as in sect. 27 with reference to empty wagons going for manure, have enacted that the toll should be paid in the first instance, and returned on production of an exemption ticket.

Shaw, for the respondent, was not called upon.

COCKBURN, C. J.—In this case I think that the justices were right in holding that the exemption from liability to toll did exist. It is true that the application of barley or barley-meal as food for cattle may be a modern practice. But the words of the Act of Parliament are wide enough to include them within the exemption, and the principle of exemption applies. It has been held that clauses of this nature are to be construed liberally, in favour of agriculture. No doubt there is some difficulty, at first sight, in saying that barley in the course of transit to a mill for the purpose of being ground into meal, *to be afterwards eaten by cattle, is already fodder for [*243 cattle; but, giving a fair and liberal construction to the words of the statute, I think that everything which is ultimately destined to be used as food for cattle is fodder for them, although it may not have gone through the final process which will make it such. Otherwise, this absurd and inconvenient consequence would follow, that if a man passed through a toll-gate with barley intended, in its natural state, as food for cattle, he would be within the exemption; but if he had a crushing machine on his own premises, to reach which with the barley he had to pass through the gate, he would be liable to toll because of his intention to crush the barley before giving it to his cattle. So, again, it would be strange if a man who was taking turnips to be boiled, before giving them to his cattle, as is done in parts of Scotland, was not exempt from toll in respect of them. A variety of similar instances might be adduced. The safer course is to construe the Act liberally, in accordance with the spirit in which such enactments ought to be construed; and to hold that the exemption extends to corn destined for the consumption of cattle, although at the time that the exemption is claimed it is in an intermediate stage towards being made into fodder for them.

(WIGHTMAN, J., was absent.)

barge, at the time of the alleged offence, was being navigated by him as before, and within the limits of the said Act.

Stat. 22 & 23 Vict. c. cxxxiii., and so much of stat. 7 & 8 G. 4, c. lxxv. as was relevant to the question at issue, were to be considered as part of the case.

The magistrate, upon the said hearing, overruled the said objections so taken on behalf of the said appellant as aforesaid, and decided and adjudged that the said appellant was guilty of the said offence, upon the ground that stat. 22 & 23 Vict. c. cxxxiii. abolished the exemption in favour of western barges referred to in the 101st section of stat. 7 & 8 G. 4, c. lxxv., and also the exemption in favour of laystalls and chalk hoys and other vessels referred to in the 104th section of *248] the same Act; notwithstanding sect. 7 of stat. 22 & 23 Vict. *c. cxxxiii.; and that the above Act applied to a barge starting from a place beyond the limits of the Act, as Guildford aforesaid, and having been navigated from such place to a place within its limits, as Putney aforesaid; and also upon the ground that the appellant had acted as a lighterman within the said limits, contrary to the provisions of the said Act. And the magistrate then adjudged the appellant to pay for his said offence the sum of 6*s.*, and 2*s.* for costs.

The question for the opinion of the Court was, whether this decision was correct. If the Court should be of opinion that it was, the conviction was to be affirmed; but if the Court should be of a contrary opinion, then the conviction was to be quashed.

Scotland, for the respondent.—The appellant was rightly convicted. It was admitted at the hearing that he was neither licensed in pursuance of, or qualified according to, The Watermen's and Lightermen's Amendment Act, 1859, 22 & 23 Vict. c. cxxxiii.: sect. 54 of which enacts that "If any person, not being a freeman licensed in pursuance of this Act, or an apprentice, qualified according to this Act, to a freeman or to the widow of a freeman of the said Company," "shall at any time act as a waterman or lighterman, or ply or work or navigate any wherry, passenger boat, lighter, vessel, or other craft upon the said river, from or to any place or places" "within the limits of this Act, for hire or gain," he shall be subject to a penalty for every such offence not exceeding 40*s.* The places within the limits of the Act are, by sect. 8, declared to be "all parts of the river Thames from and opposite to and including Teddington Lock in the counties of *249] Middlesex and Surrey, *to and opposite to and including Lower Hope Point near Gravesend in the county of Kent." The case finds that the appellant worked and navigated a barge, for hire and gain, at Putney, within these limits. That being so, he clearly committed the offence prohibited by sect. 54, and the fact that the barge started on its voyage from Guildford, a place beyond the limits of the Act, constitutes no defence. A main object of the Act, as the preamble recites, was, "that proper regulations should be made for the navigation of barges, lighters, boats, and other like craft carrying goods, wares and merchandise within the limits of" the "Act, and for the regulation of the persons employed to navigate the same, and for the security of passengers passing to and fro on the said river in boats and other craft, and for the orderly conduct of the traffic on the said river." This object would be in great measure frustrated, if unquali-

fied persons can elude the provisions of the Act by starting from points a little higher up the river than Teddington Lock. In *Reed v. Ing-ham*, 3 E. & B. 889 (E. C. L. R. vol. 77), it was held, upon the construction of the corresponding section (the 37th) in the repealed Act, 7 & 8 G. 4, c. lxxv., that a steam-tug was not a "wherry, lighter, or other craft," and therefore that a person navigating her within the prescribed limits was not liable to the penalty. The decision is not in point here; but the observations of Erle, J., to the effect that the watermen's privilege was given them for the public good, on the presumption that they would go through the proper means of qualifying for the duties which they would have to perform, illustrate the "intention of the Legislature. [COCKBURN, C. J.—You need not argue this [*250 point further. It would be putting a most absurd construction upon the Act to hold that the statutory prohibition upon the navigation of lighters by unqualified persons within the prescribed limits does not operate if the lighter starts from Hampton Court instead of Teddington; the necessity for a competent qualification in the person navigating being the same in both cases.] That is the only reasonable interpretation of the statute. *Walker v. Evans*, 2 E. & E. 356 (E. C. L. R. vol. 105), is a direct authority in favour of it. It was there held that a steam-tug which occasionally applied to and fro between London Bridge and places to the eastward of the Nore Light was, while employed on any portion of the river between London Bridge and the Nore Light, subject to the penalties for not consuming its own smoke, imposed by stat. 19 & 20 Vict. c. 107, s. i., on "all steam vessels plying to and fro between London Bridge and any place on the river Thames to the westward of the Nore Light." The only remaining point is, whether the fact found in the case that the appellant's barge would have been deemed a "western barge" under sect. 101 of the repealed Act, 7 & 8 G. 4, c. lxxv., exempts him from liability to conviction. It is thereby enacted "That nothing in" that "Act contained," with some immaterial exceptions, "shall extend to any western barges; and that all flat bottomed boats and barges navigated from the town of Kingston in the county of Surrey, or any place or places beyond the said town, shall be deemed western barges, and shall and may be navigated on the said river of (a) Thames as far as London Bridge;" *and no person or persons navigating such western barges" [*251 "shall in respect thereof be subject or liable to any penalties or forfeitures imposed by this Act." The appellant will contend that this exemption in favour of western barges is preserved by sect. 7 of stat. 22 & 23 Vict. c. cxxxiii. That section, however, so far as it is material, merely enacts that the repeal of stat. 7 & 8 G. 4, c. lxxv., "shall not affect" "any appointment or license duly made or granted under any enactment hereby repealed." And it is manifest that the exemption of a western barge from penalties was neither an appointment or a license under any repealed Act. The licenses and appointments referred to were licenses and appointments granted by the Watermen's Company under the powers of the former Act. The recent Act contains numerous express exceptions from its operation, and had the Legislature intended to continue the exemption of western barges, they would have said so.

(a) Sic.

Bovill, contra.—As to the first point; the construction of the Act contended for by the other side will exclude men who have been navigating barges on the river all their lives from continuing to do so within the prescribed limits, although mere apprentices of two years' standing are supposed competent for the task. *Reed v. Ingham*, 3 E. & B. 889 (E. C. L. R. vol. 77), has no further application to the present case than that it shows that these Acts, like penal enactments, are to be construed strictly. As to the second point, the Legislature, by sect. 7 of the recent Act, intended to save all existing rights and exemptions, although they might, no doubt, have used apter words for that purpose. [COCKBURN, C. J.—The question really narrows itself *252] to this: is the exemption in favour of western barges *contained in stat. 7 & 8 G. 4, c. lxxv., an "appointment or license duly made or granted" under that Act, within the meaning of stat. 22 & 23 Vict. c. cxxxiii.? And how can it be either the one or the other? HILL, J.—It is scarcely conceivable that the Legislature would not have re-enacted the provisions of the old Act in favour of western barges, had they intended to preserve them. COCKBURN, C. J.—Stat. 7 & 8 G. 4, c. lxxv. s. 37, corresponds exactly with stat. 22 & 23 Vict. c. cxxxiii. s. 54. And the express exemption of persons navigating western barges from liability to conviction is found only in the former Act.] That being the opinion of the Court, the point will not be further pressed. There is, however, a further point; namely, that sect. 54 does not impose an absolute prohibition upon the navigation of a barge by an unlicensed person within the limits of the Act. This appears from sect. 66, which, after prohibiting the navigation of any barge, lighter, boat and other craft, within the limits, unless in charge of a licensed lighterman or qualified apprentice, under a penalty upon the owner not exceeding 5*l.*, provides "that no such penalty shall be payable if the owner proves, to the satisfaction of the magistrate or Court before whom the case is heard, that he is unable, for the usual compensation, to obtain the services of any such lighterman or apprentice." Ability to obtain those services, and failure, notwithstanding, to obtain them, is therefore an implied ingredient in the offence created by sect. 54, and it is consistent with the facts stated in the case that this ingredient was wanting in the alleged offence imputed to the appellant. [HILL, J.—Sect. 66 does not apply to the navigation of a barge for hire or gain, by an unqualified person, which is the offence prohibited by sect. 54.]

*253] *COCKBURN, C. J.—This conviction was clearly right. If there is any hardship in the present state of the law, the Legislature alone can interfere.

(WIGHTMAN, J., was absent.)

HILL and BLACKBURN, Js., concurred.

Conviction affirmed.

EX parte BARTLETT. Nov. 15.

Stat. 5 & 6 W. 4, c. 50, s. 95, enacts, "that if on the hearing of" a "summons respecting the repair of any high-way the duty or obligation of such repairs is denied by the surveyor" of the parish alleged to be chargeable with the repairs "on behalf of the inhabitants of the parish," "it shall then be lawful for" the "justices" in special sessions for the highways, before whom the summons is heard, "and they are hereby required, to direct a bill of indictment to be preferred" "at the next assizes" "against the inhabitants of the parish" "for suffering and permitting the said highway to be out of repair."

Held, that, although where the road alleged to be out of repair is admitted at the hearing to be a highway and to need repair, and only the liability to repair is disputed by the parish, this section renders it imperative on the justices to order an indictment to be preferred, they have no jurisdiction to make such an order, if it appears that the parish has already been acquitted on a similar indictment.

KINGLAKE, Serjt., moved, on behalf of John Bartlett, for a rule calling on three justices of Somersetshire to show cause why they should not make an order, under stat. 5 & 6 W. 4, c. 50, s. 95, directing that an indictment should be preferred against the inhabitants of East Coker for the non-repair of a certain highway.

It appeared from the applicant's affidavit that, on 29th August, 1860, he laid an information before a justice of the county, alleging that a highway called Isles Lane, in the parish of East Coker, in the said county, extending from its connection with the public highway from East Coker to Pendomer to the point which connects it with the highway from East Coker to Sutton Bingham, was out of repair, and that the parish of East Coker was chargeable with the repair; that thereupon the justice issued a summons to the surveyor of the said parish, to appear before the justices at the next special high- [254] way Sessions for that division of the county, to be holden on 5th September, 1860; that at those Sessions the surveyor appeared before the three justices called upon by the proposed rule, and, on behalf of the parish denied the duty or obligation to repair, on the ground that a previous indictment against the inhabitants of the parish, for the non-repair of the same highway, had been preferred by order of justices, under stat. 5 & 6 W. 4, c. 50, s. 95, and a verdict of acquittal had been returned thereon, at the last Lent Assizes for the county. That thereupon the applicant applied to the justices to order, under the 95th section of the said Act, an indictment to be preferred against the parish; which they refused to do. The affidavit further stated that, at the trial of the indictment at the Lent Assizes, conclusive evidence was given of the user of the lane by the public, as a highway, for the last fifty years and upwards, and that a large portion of such highway had been from time to time repaired by the parish of East Coker; and that, among other grounds of defence, the defendants then contended that a portion of the highway was not within their parish; and the jury, after being looked up nearly five hours, gave a verdict of acquittal, which was against the evidence and the summing up of the presiding Judge. There were also affidavits of aged persons, as to the user of the lane for many years as a highway: and that a great portion of it had been confessedly repaired by the parish of East Coker, with hard materials, for a number of years.

Kinglake, Serjt., for his rule.—The justices were bound to order the indictment to be preferred. Stat. 5 & 6 W. 4, *c. 50, s. 95, [255] enacts "That if on the hearing of any" "summons respecting

the repair of any highway the duty or obligation of such repairs is denied by the surveyor on behalf of the inhabitants of the parish," "it shall then be lawful for such justices and they are hereby required to direct a bill of indictment to be preferred" "at the next Assizes" "against the inhabitants of the parish" "for suffering and permitting the said highway to be out of repair." This enactment is imperative, and leaves the justices no discretion: *Regina v. Arnould*, 8 E. & B. 550 (E. C. L. R. vol. 92). [HILL, J.—There is this distinction between that case and the present, that, here, the road has been found by the verdict of a jury not to be a highway repairable by the parish. I think that the justices are justified in declining to make an order if they have proof before them that the parish is not liable.] The verdict was a general one of Not guilty; but, if it is an answer to a fresh indictment, it may be given in evidence at the trial. [BLACKBURN, J.—It appears from *Regina v. Heapor*, 6 Q. B. 745 (E. C. L. R. vol. 51), that an indictment ought not to be preferred against the parish, unless the road is a highway.]

COCKBURN, C. J.—I am of opinion that there should be no rule. This is an application to us for our summary interposition, the exercise of which is discretionary, and ought not, I think, to be put in force in the present case. It is clear that stat. 5 & 6 W. 4, c. 50, s. 95, requires the justices to direct an indictment to be preferred, only where the liability to repair the road is disputed and it has not been already determined by verdict that the road is not a highway. It is *256] evident *that, if this rule were granted, parishes might be perpetually harassed by fresh indictments for the non-repair of roads, their liability to repair which had already been negatived by the verdict of a jury. That would encourage a vexatious course of proceeding. Our refusal to grant this application does not, on the other hand, preclude the applicant from preferring an indictment against the parish at common law.

(WIGHTMAN, J., was absent.)

HILL, J.—I am of the same opinion. Sects. 94 and 95 of stat. 5 & 6 W. 4, c. 50, apply only to the case of an admitted highway. In order to found the jurisdiction of the justices to make the order for an indictment the road must be a highway, and it must be out of repair; which latter fact the justices are to ascertain either in person or by a surveyor. Then comes the question of the liability to repair. If that only is disputed, and the facts are admitted, the justices are to order an indictment to be preferred, but not otherwise.

BLACKBURN, J.—Sect. 95 assumes that there is a highway, and that it is out of repair. These two facts are conditions precedent to the justices acting in the matter. When these facts have been established, and not before, the justices have no discretion to refuse to direct an indictment to be preferred against those by whom the liability to repair is denied.

Rule refused.

*HILL, Appellant, v. THORNCROFT, Respondent. Nov. 17. [*257

Stat. 4 & 5 W. 4, c. 76, s. 84, enacts, "That the parish to which any poor person whose settlement shall be in question at the time of granting relief shall be admitted or finally adjudged to belong shall be chargeable with and liable to pay the cost" "of the" "maintenance of such poor person, and such cost" "may be recovered against such parish in the same manner as any penalties or forfeitures are by this act recoverable:" provided that such parish shall pay to the relieving parish such cost from such time only as notice that the poor person has become chargeable shall have been sent by the relieving parish to the parish of settlement. By sect. 79 no poor person is to be removed, under an order of removal, until twenty-one days after written notice of his being chargeable has been sent by the relieving parish to the parish of settlement, have elapsed without an appeal by the latter parish against the order of removal. By sect. 99, penalties and forfeitures under the Act are made recoverable by information before justices and their order thereon, no time being limited for laying the information.

Stat. 11 & 12 Vict. c. 43, s. 11, enacts, "That in all cases where no time is" "specially limited for" "laying any" "information in the Act" "of Parliament relating to each particular case," "such information shall be laid within six calendar months from the time when the matter of such" "information" "arose." By sect. 35, "Nothing in this Act shall extend or be construed to extend to any warrant or order for the removal of any poor person who" "shall become chargeable to any parish."

An order having been made for the removal of a female pauper, written notice of her chargeability was sent by the relieving parish to the parish of settlement, which did not appeal against the order of removal. At the date of the order the pauper was pregnant, though not unable to bear removal. She so continued for some months, and was not actually removed till after her delivery, and five months after the service of the notice of chargeability. Nearly six years after her removal, the relieving parish laid an information before justices against the parish of settlement, for the cost of her maintenance from the time of the service of the notice of chargeability to that of her actual removal: and the justices made an order for the full amount.

On appeal by the parish of settlement against this order: held, First, that the relieving parish was entitled, under stat. 4 & 5 W. 4, c. 76, ss. 79, 84, and 99, to the cost of the pauper's maintenance only for the twenty-one days next after the service of the notice of chargeability. Secondly, that the information on which the order was founded was laid too late, by reason of stat. 11 & 12 Vict. c. 43, s. 11; and was not within the exemption in sect. 35.

CASE stated under stat. 20 & 21 Vict. c. 43.

At a Petty Sessions of the justices for Brighton, held on 15th December, 1859, an information came on for hearing which had, on 5th December, 1859, been laid by Samuel Thorncroft, the respondent, assistant overseer of the poor of the parish of Brighton, charging that the churchwardens and overseers of the poor of the parish of Cullompton, in the county of Devon, and Henry Hill, *the appellant, [*258 assistant overseer of the poor of the same parish, being the parish to which one Elizabeth Hill and her illegitimate child, James Hill, poor persons, had been adjudged to belong, had refused and still did refuse to pay to the directors and guardians and the assistant overseer of the poor of the parish of Brighton aforesaid, the sum of 10*l.* 12*s.* 3*d.*, being the cost and expense of the relief and maintenance of such poor persons under an order of two justices of the peace for the county of Sussex, dated 6th October, 1853, for the removal of the said Elizabeth Hill, and her said child from the said parish of Brighton to the said parish of Cullompton, from the time that notice of such order and of the said poor persons having become chargeable to the said parish of Brighton had been sent by such parish to the said parish of Cullompton.

The facts of the case proved before the justices were as follows.

On 6th October, 1853, an order for the removal of Elizabeth Hill and her illegitimate child, James Hill, from the parish of Brighton to

the parish of Cullompton, was duly made by two justices for the county of Sussex. On 14th October, 1853, a copy of the said order of removal, with notice of chargeability and grounds of removal, was duly sent by post by the directors and guardians of the poor of the parish of Brighton to the overseers of the parish of Cullompton. Elizabeth Hill was, at the time of the said order being made, maintained in the workhouse of Brighton. She was pregnant at that time, and was delivered at the said workhouse on 8d January, 1854. By reason of such pregnancy and delivery, and the delicate state of her health consequent thereupon, she could not be removed under the *259] *said order till 9th March, 1854. During all that time she continued an inmate of the workhouse of Brighton, and during such time her said child, James Hill, died. On 9th March, 1854, the said order was executed by the delivery of the said Elizabeth Hill and the infant to which she had given birth after the making of the said order, with a duplicate of the said order and a statement of charges for maintenance, to the assistant overseer of Cullompton at Cullompton; and the sum of 10*l.* 12*s.* 3*d.* was then demanded of the said assistant overseer of Cullompton as due to the parish of Brighton for the maintenance of the said paupers, but was not then paid and has not since been paid. The said sum of 10*l.* 12*s.* 3*d.* had been expended by the parish of Brighton, for the maintenance of the said Elizabeth Hill and her said child James Hill and her said infant, from the time when the copy of the said order of removal and the notice of chargeability and grounds of removal were sent to the overseers of Cullompton, to the time of the said Elizabeth Hill and infant being removed under the said order; and the sum of 3*l.* 14*s.* 11*d.*, part of such sum of 10*l.* 12*s.* 3*d.*, was expended more than six years before the information was laid.

It was objected on behalf of the defendants; First, that the information ought to have been laid within six months from the time of the said sum of 10*l.* 12*s.* 3*d.* being demanded, as required by stat. 11 & 12 Vict. c. 43, s. 11, and that this was not a proceeding excepted from the operation of that Act by the 35th section thereof. Secondly, that the order ought to have been suspended, and notice of such suspension sent to the overseers of Cullompton. Thirdly, that the moneys *260] *expended more than six years before the information was laid, were irrecoverable, by reason of the Statute of Limitations.

The justices decided against the defendants, and made an order for the payment of the 10*l.* 12*s.* 3*d.*, and the costs incurred before them. The grounds of their decision were that they considered this proceeding was, by the 35th section of stat. 11 & 12 Vict. c. 43, excepted from the operation of that statute; that Elizabeth Hill was not at the time of making the order unable to travel from any cause other than her pregnancy, which did not afford legal ground for the suspension of the order; and that the Statute of Limitations was no bar to the recovery of the moneys expended more than six years previously to the information being laid as directed by stat. 4 & 5 W. 4, c. 76, s. 84.(a)

(a) No question was stated for the opinion of the Court.

Tomlinson, for the appellant.(a)—It is not now contended, for the appellant, that the Statute of Limitations was a bar to the information. The first and material question is whether the information was not too late, considering the years which had elapsed since the order of removal was made. That it was so is shown by stat. *11 & 12 Vict. c. 43, s. 11, which enacts "That in all cases where no [*261 time is already or shall hereafter be specially limited for making any" "complaint or laying any" "information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose." That section applies to the information in the present case. The respondent will contend that it does not, by reason of sect. 35, which enacts "That nothing in this Act shall extend or be construed to extend to any warrant or order for the removal of any poor person who is or shall become chargeable to any parish, township, or place;" but the operation of that clause is limited to the warrant or order for removal itself, and does not extend to a subsequent independent order for the payment of expenses of maintenance. This is shown clearly by the language of the following clause of the section, which, as regards lunatics, does in terms exempt from the operation of the Act "complaints or orders made with respect" not only to them but to "the expenses incurred for the lodging, maintenance, medicine, clothing or care of" them. The information, therefore, was required, by sect. 11, to be laid within six months from the time when the matter of the information arose. The reason for the distinction made by the Legislature between the cases of common paupers and lunatic paupers is that, before stat. 11 & 12 Vict. c. 43, the expenses of the maintenance of the former were recoverable under stat. 4 & 5 W. 4, c. 76, s. 99, by which no time was limited for the recovery: whereas those of the maintenance of the latter were, by stat. 8 & 9 Vict. *c. 126, ss. 62, 63, 64, recoverable only in respect of the [*262 twelve calendar months before the date of an order. The same remark applies to orders in bastardy made against putative fathers; which are also, by stat. 11 & 12 Vict. c. 43, s. 35, exempted from the operation of that Act, they being already provided for by stat. 7 & 8 Vict. c. 101, ss. 2-5. There would be manifest injustice in holding, as the respondent asks the Court to do, the inhabitants of a parish to be liable to pay the expenses of the relief of a pauper nearly six years before; for great part of the inhabitants must have changed in the interval. Secondly, the order of removal ought to have been suspended. The facts material to this point are stated very obscurely in the case. Admitting, however, that the pauper's pregnancy, alone, would not have amounted to sickness rendering her unable to travel, it appears from

(a) Wednesday, November 14th. According to the practice of the Court, counsel in support of the information would have begun. The respondent, however, had made default in delivering to the Judge copies of the case stated. The appellant had, consequently, delivered them for him; but as they had neither been paid for, nor had any deposits been made with the Master in pursuance of the 16th practice rule of Hilary Term, 1853 (made applicable by order of the Judges of Michaelmas Term, 1857, to cases stated under stat. 20 & 21 Vict. c. 43), the Court could not now hear counsel for the respondent; but arranged to do so on the next Crown paper day, on the respondent complying with the rule in the interim.

the case that she was also in a delicate state of health, and that, as a matter of fact, she could not be removed during all the time from 6th October, 1858, to 9th March, 1854. From these statements the inference fairly arises that she was so ill that it would have been dangerous for her to travel. If so, stat. 35 G. 3, c. 101, s. 2, applies; which, after reciting that poor persons are often removed or passed to the place of their settlement during the time of their sickness, to the great danger of their lives, enacts "That in case any poor person shall from henceforth be brought before any" "justices" "for the purpose of being removed from the place where he or she is inhabiting or sojourning, by virtue of any order or removal," "and it shall appear to the said" justices that such poor person is unable to travel, by reason of sickness or other infirmity, or that it would be dangerous for *263] him or her so to do, the" "justices making such *order of removal" "are hereby required and authorized to suspend the execution of the same until they are satisfied that it may safely be executed without danger to any person who is the subject thereof: which suspension of, and subsequent permission to execute the same, shall be respectively endorsed on the said order of removal" "and signed by such" "justices." [COCKBURN, C. J.—What is there in the case, as stated, to show us that when the application for the order of removal was made it appeared to the justices that the pauper was unable to travel? It is consistent with the facts stated that the sickness, if any, which disabled her from travelling, supervened after the making of that order.] The case seems to find that the inability to travel existed when the order was made. If it did, the order of removal ought to have been suspended; and notice thereof given by the respondent to the appellant, under stat. 4 & 5 W. 4, c. 76, s. 84, which enacts "That no charges or expenses of relief or maintenance shall be recoverable under a suspended order of removal unless notice of such order of removal, with a copy of the same, and of the examination upon which such order was made, shall have been given within ten days of such order being made to the overseers of the poor of the parish to whom such order is directed." That enactment, however, it is admitted, is not a bar to the recovery of the costs and expenses for which the order was made in the present case: the information for them having been founded on the original order of removal.

*264] *G. Denman* was now heard for the respondent.(a)—*To begin with the second point. The case does not fall within stat. 35 G. 3, c. 101, s. 2; for the justices have not found as a fact that it appeared to the justices who made the order of removal that the pauper was then unable to travel, by reason of sickness. All that is found is, that she was then pregnant; but pregnancy, per se, does not amount to sickness: *Regina v. Huddersfield*, 7 E. & B. 794 (E. C. L. R. vol. 90). And the statute does not provide for the suspension of an order of removal upon a sickness supervening after it is made; the order can be suspended only at the time it is made: *Regina v. Llanllechid*, 2 E. & E. 530 (E. C. L. R. vol. 105). The order for the payment of the expenses of the pauper's maintenance was rightly made by the justices under the first clause of stat. 4 & 5 W. 4, c. 76, s. 84,

(a) See note (a), p. 260.

which enacts "That the parish to which any poor person whose settlement shall be in question at the time of granting relief shall be admitted or finally adjudged to belong shall be chargeable with and liable to pay the cost and expense of the relief and maintenance of such poor person, and such cost and expense may be recovered against such parish in the same manner as any penalties or forfeitures are by this Act recoverable: Provided always that such parish, if not the parish granting such relief, shall pay to the parish by which such relief shall be granted the cost and expense of such relief and maintenance from such time only as notice of such poor person having become chargeable shall have been sent by such relieving parish to the parish to which such poor person shall be so admitted or finally adjudged to belong." Under this section the appellant's parish was clearly liable to the expenses of the pauper's maintenance from *14th October, 1853, on which day notice of her having become chargeable was sent to the overseers by post; a mode of service expressly sanctioned by sect. 79. [HILL, J.—Sect. 84 must be construed as giving to the relieving parish the costs of the pauper's maintenance for such period only as the settlement shall be in question. By sect. 79 that period may be either twenty-one days after the receipt by the parish of settlement of notice of the pauper's chargeability and of the order of removal; or a period shorter or longer, according as the parish of settlement, before the twenty-one days expire, submits to or gives notice of appeal against the order. In the present case, the period was the twenty-one days. How, then, can the respondent be entitled to an order for expenses accrued since they expired?] Sect. 84 puts no limit upon the amount of expenses recoverable. It cannot have been intended that, in every case like the present, the relieving parish should remove the pauper within the twenty-one days, no matter what the state of the pauper's health may be, on pain of having to be at the cost of his maintenance during the time of any further delay. [COCKBURN, C. J.—If your argument is well founded, the relieving parish might keep the pauper for twenty years and charge the parish of settlement with the expense.] Such an abuse would not be warranted by the Act. Stat. 4 & 5 W. 4, c. 76, s. 84, is an enactment independent of stat. 35 G. 3, c. 101, s. 2. In *re The Overseers of Chedgrave*, 20 L. J. N. S. M. C. 23. The later statute provides a remedy cumulative upon that given by the earlier; and was intended to meet the case where the pauper's sickness supervenes after the order of removal, though *not apparent at the time the order is made. [COCKBURN, C. J.—Sect. 84 of stat. 4 & 5 W. 4, c. 76, must be read in connection with the previous sections, beginning with sect. 79; and, so read, must receive the construction which my brother Hill has pointed out.] At all events, even if the Court adopt that construction, the respondent was entitled to an order for the costs of the pauper's maintenance for the twenty-one days next after the notice of chargeability was sent; unless the information was too late, by reason of stat. 11 & 12 Vict. c. 43, s. 11. But, lastly, the justices were right in holding that that section did not apply to the case; seeing that sect. 35 exempts from the operation of the Act any warrant or order for the removal of a pauper. The costs of the relief and maintenance of a pauper, pending removal, are closely connected with and incident

to the order of removal. [HILL, J.—Sect. 35 is silent about matters connected with or incident to an order of removal.] The words “order of removal” are sufficient to include all such matters. The “complaints upon which” “justices” “may make an order for the payment of money,” mentioned in sect. 8, cannot have been meant to include complaints founded upon an order of removal; otherwise sect. 35 would be practically reduced to a nullity. [HILL, J.—By stat. 4 & 5 W. 4, c. 76, s. 84, the cost and expense of the pauper’s relief and maintenance are made recoverable “in the same manner as any penalties or forfeitures are by this Act recoverable;” that is, by sect. 99, by an order of justices made on a distinct information, and enforceable by distress.]

Tomlinson, in reply, was stopped.

*267] *COCKBURN, C. J.—As to the first question, it appears to me that stat. 4 & 5 W. 4, c. 76, s. 84, does not entitle the parish of Brighton to any further costs of the pauper’s maintenance beyond those incurred during the twenty-one days next following the notice of chargeability given to the parish of Collumpton. It appears clear that this section was intended to apply, only, to the expenses incurred by the relieving parish during the period given by previous sections to the parish of settlement, in which to consider whether to submit to or appeal against the order of removal. Sect. 79 having provided that a pauper should not be removable, in a case where no appeal was brought, until twenty-one days after the receipt by the parish of settlement of the notice of chargeability; or, if an appeal was brought, until the appeal was finally determined; sect. 84 fixes the parish of settlement with the costs of the pauper’s relief and maintenance during this suspension of removal. But that section appears to make no provision for a case in which, sickness of the pauper supervening after the making of the order of removal, it becomes dangerous or unadvisable to remove him at the expiration of the twenty-one days. Upon the authorities it is clear that an order of removal can be suspended only at the time it is made, and if the justices who make it are at that time satisfied that the pauper is then in an unfit state for removal. The omission by the Legislature to give the justices a like power in the event of sickness, causing inability to bear removal, afterwards supervening, may very possibly form good ground for a remedial Act of Parliament; but cannot be cured by us. The parish of Brighton would therefore be entitled to no more than the twenty-one days’ expenses. These they might have recovered but for

*268] the difficulty presented by stat. 11 & 12 Vict. c. 43, s. 11; and this brings me to the second point in the case. That section imposes six calendar months from the time when the matter of a complaint or information arises, as the period of limitation within which a complaint or information, not theretofore restricted as to time, must be made. It is admitted that the information in the present case fell within the operation of this enactment unless it is exempted therefrom by sect. 35 of the same statute; and I think that it is not so. Sect. 35 is in terms limited to “any warrant or order for the removal of any poor person.” In the case before us, the order of justices is neither a warrant nor an order for removal, but simply an order for the payment of costs and expenses consequent upon an order of

removal; nor does it fairly come within what may be supposed to have been the intention of the Legislature in enacting the exemption in question. There was good reason for not restricting unduly the time for removing a pauper; but the question of costs stands on a very different footing. A parish is a fluctuating community; and it would have been highly inexpedient, not to say unjust, to saddle one set of inhabitants with costs chargeable upon their predecessors. Apart, however, from considerations of that nature, suffice it to say that the order before us is not a "warrant or order for the removal of any poor person" within the meaning of stat. 11 & 12 Vict. c. 43, s. 35. The argument for the respondent fails, therefore, upon both grounds.

(WIGHTMAN, J., was absent.)

HILL, J.—I am of the same opinion. This was an *application [269 to justices by Brighton against Collumpton, for an order for the costs of the maintenance of a pauper removed from the former to the latter. The information was laid under stat. 4 & 5 W. 4, c. 76, s. 84, and the whole amount of the costs incurred in the pauper's maintenance, from 14th October, 1853, the date on which the notice of chargeability was served on Collumpton, to 9th March, 1854, the date of her actual removal, were claimed as recoverable. In order to ascertain how far stat. 11 & 12 Vict. c. 43, s. 11, affects the right of Brighton to recover these costs, it is important to consider the provisions of the statute of W. 4. Sect. 84 of that Act enacts that the costs in question shall be recoverable "in the same manner as any penalties or forfeitures are by this Act recoverable;" that is, as appears from sect. 99, by order of justices made on a distinct information in that behalf. The costs are therefore recoverable by proceedings consequent upon, not under, the original order of removal. But stat. 11 & 12 Vict. c. 43, s. 11, expressly enacts that in all cases (and the present is one) where no time is specially limited for laying an information in the Act relating to the particular case, "such information shall be laid within six calendar months from the time when the matter of such" "information" "arose." The present information not having been laid till upwards of six calendar months after the matter of it arose, was clearly, therefore, too late, unless it falls within the exemption created by sect. 35 in favour of "any warrant or order for the removal of any poor person." But, as I have already said, this information forms no part of the warrant or order for removal, but is a step subsequent to and wholly distinct from it. I may also observe that sect. 35 is satisfied by *supposing it to enact merely that [270 none of the forms given in the schedule to the Act, and which, by sect. 32, are to be deemed good, valid and sufficient in law, shall be applicable to a warrant or order of removal. It does not exempt from the operation of the Act an information of the present description, any more than any other proceeding. I think, therefore, that the limitation clause clearly applies, and that the justices had no jurisdiction to make any order at all. Upon the other point, I entirely concur in all that the Lord Chief Justice has said, and agree with him that, if the limitation clause had not applied, no further costs of the pauper's maintenance could have been recovered by the

relieving parish than those incurred during the twenty-one days next following the service by them of the notice of chargeability.

BLACKBURN, J.—I am of the same opinion on both points. Stat. 11 & 12 Vict. c. 43, applies generally to all proceedings by way of information or complaint before justices. Sect. 35 exempts certain matters from the operation of these general provisions, orders of removal amongst them: but this exemption evidently applies to such orders themselves, only, not to proceedings taken in consequence of them. Now an order for the costs of the maintenance of a pauper, made consequently to an order of removal, is no part of the order of removal. Stat. 4 & 5 W. 4, c. 76, s. 84, taken in conjunction with sect. 99, enacts that these costs shall be recoverable by a distinct and independent information and order of justices made thereupon. No limitation of time being fixed by that Act, for laying the information, the case clearly falls within the very words of stat. 11 & 12 Vict. c. *271] 43, s. 11, and is not within the benefit *of sect. 35. And, independently of the provisions of the later statute, it seems only reasonable that a parish should not be liable to have such claims raked up against it at any distance of time. Upon the other point, I entirely agree with the opinion of the Lord Chief Justice, and with the reasons which he has given for it.

Order quashed, without costs.

The QUEEN v. BODKIN and Others, Justices of MIDDLESEX.
Nov. 19.

By The Nuisances Removal Act for England, 1855, 18 & 19 Vict. c. 121, s. 22, whenever any drain used for the conveyance of sewage from any house, buildings, or premises, is a nuisance, and cannot, in the opinion of the Local Authority, be rendered innocuous without the laying down of a sewer, the Local Authority are empowered and required to lay down such sewer, and are authorized and empowered to assess every house, building, or premises using the same, to such payment as they shall think just and reasonable.

Under this Act the parish of H. was, in the first instance, divided into four districts. The Local Authority, in 1855, constructed a sewer in one of these, in order to render a nuisance there innocuous; B.'s house, situated there, was assessed to the expense of the construction; and B. paid an agreed composition on the assessment. In 1856 the Local Authority constructed another sewer in a second district, in order to render a nuisance in that district innocuous. These two sewers brought down the sewage from the two districts into a third, in such quantities as to greatly increase a pre-existing nuisance there: in order to render which innocuous, the Local Authority, in 1859, constructed a further sewer, running through the third and fourth districts, and, upon its completion, resolved that the drainage of all four districts should form one system, the total costs of the different works be ascertained, and the houses, &c., through all four districts, using the sewers, be equally assessed towards the expenses incurred.

Held that B.'s house, above mentioned, was liable to be re-assessed to such expenses as a house "using" the whole sewerage system, within the meaning of sect. 22.

HONYMAN had obtained a rule, calling upon three of the justices of Middlesex and Thomas Beall to show cause why the said justices should not issue their warrant to levy by distress and sale of the goods of the said Thomas Beall the sum assessed upon him in respect of a house and premises owned and occupied by him in or near Maynard Street, in the parish of Hornsey, in the said county, by the Local Authority in the said parish for executing the Nuisances Removal Act *272] for England, *1855, by an assessment, dated 19th December, 1859, upon all houses, buildings, and premises in the village

of Hornsey and Crouch End, in the said county, using, for the purposes mentioned in the said Act, the sewers, drains, &c., constructed by the said Local Authority.

It appeared from the affidavits on which the rule was obtained that, for the purposes of drainage under the Nuisances Removal Act for England, 1855, the parish of Hornsey had been divided into four districts: Hornsey Village District, Muswell Hill District, Crouch End District, and Maynard Street District; in the last of which the house and premises of Thomas Beall were situate. In the year 1855 certain drainage works were executed by the Local Authority in that district, for the conveyance of the sewage, &c., from that district, and in order to render innocuous a certain ditch used for the conveyance of sewage. The houses and premises in the district were assessed, and Beall was charged with the annual payment of 15s. The Local Authority resolved that the assessment of houses, &c., in the district might be redeemed by the payment within a certain time of four annual payments. Accordingly, and in pursuance of such resolution, Beall paid a sum of 8l., and also a further sum of 4l., in respect of houses and premises for which he had been charged; and he received a receipt for that amount "in full discharge and acquittance of all sums and payments charged and assessed, and at any time payable for and in respect of the said premises, under the order of assessment made on 17th December, 1855." During the year 1856, the said Local Authority, under the powers given by the said Act, constructed another sewer or drain at or near Muswell Hill; which, in the opinion of the said Local *Authority, was necessary to render innocuous a [*273 certain ditch or watercourse at or near Muswell Hill, for the conveyance of water, filth, &c., and which was a nuisance. The houses using this sewer or drain were assessed to defray the expense thereof. These sewers, constructed in the Muswell Hill and Maynard Street Districts, resulted in greatly increasing a nuisance which before existed in the village of Hornsey; inasmuch as the sewage, in greater quantities, was brought down from the two former districts to the open ditches in the village; and, to remove such nuisances, works on a larger scale became necessary. In the year 1859 divers drains and watercourses in the Crouch End District and in the village of Hornsey, used for the conveyance of water, filth, &c., became and were nuisances, and could not, in the opinion of the Local Authority, be made innocuous without the laying down of a sewer and other structures along the same; and thereupon the said Local Authority did lay down a sewer at the village of Hornsey and at Crouch End, and on the completion thereof it was resolved by the said Local Authority that the drainage of Maynard Street, Muswell Hill, and Crouch End, and in the village of Hornsey, should be considered as one system; that the total cost of the different works should be ascertained; and that all persons using, for the purposes mentioned in the said Act, the sewers, drains, &c., should be assessed at an equal rate towards the expenses incurred. Accordingly, all the houses, buildings, and premises in all the four districts, which were alleged to use, for the purposes mentioned in the Act, the sewers, drains, &c., were assessed by an assessment dated 19th December, 1859. Among others, the said [*274 Thomas Beall was assessed, and, as he refused to *pay, he was

summoned before the justices named in the rule, who, after hearing the evidence, refused to grant a distress warrant. There were counter affidavits as to whether Beall did or did not use the new sewer or drain made in 1859, he swearing that he did not, and the surveyors for the Local Authority swearing that he did. It appeared, however, that the village of Hornsey was situated on a lower level than Muswell Hill and Maynard Street, and that the waters, &c., from the two latter districts ran down towards the village.

Montagu Smith and *Aspland* now showed cause.—The Local Authority exceeded their powers in assessing Mr. Beall in December, 1859. The Nuisances Removal Act for England, 1855, 18 & 19 Vict. c. 121, s. 22, enacts that "Whenever any ditch, gutter, drain, or watercourse used or partly used for the conveyance of any water, filth, sewage, or other matter from any house, buildings, or premises, is a nuisance within the meaning of this Act, and cannot, in the opinion of the Local Authority, be rendered innocuous, without the laying down of a sewer, or of some other structure along the same or part thereof, or instead thereof, such Local Authority shall and they are hereby required to lay down such sewer or other structure, and to keep the same in good and serviceable repair;" "and such Local Authority are hereby authorized. and empowered to assess every house, building, or premises then or at any time thereafter using, for the purposes aforesaid, the said ditch, gutter, drain, watercourse, sewer, or other structure, to such payment" "as they shall think just and reasonable." It appears from the affidavits that Mr. Beall's house and premises, in respect of which it is now sought to assess him, are
 *275] *situate in Maynard Street District; that the nuisance in that district was rendered innocuous by the Local Authority in the year 1855; and that Mr. Beall was then assessed to and compounded for his share of the expense of the drainage works necessary for that purpose. The power of the Local Authority to assess him, under sect. 22, was therefore fully exercised in 1855; and he is not liable to assessment in respect of the cost of drainage works made four years afterwards in an entirely distinct district. [COCKBURN, C. J.—The Local Authority having resolved that the drainage of all the districts shall be considered as one system, what is there to prevent the assessment of all houses using that system for drainage purposes?] Houses situate in Maynard Street District cannot be said to use the system, inasmuch as the drainage of that district was completed before the system was formed and the drainage works in the other districts executed. In *Regina v. Tatham*, 8 E. & B. 915 (E. C. L. R. vol. 92), this Court held that the Local Authority has no power, under sect. 22, to assess property beyond the limits of their local jurisdiction. The question whether houses situate within the jurisdiction could be said to use a sewer beyond its limits was mooted but not decided. Lord Campbell, C. J., however, appears to have thought that they could not, inasmuch as they derived no benefit from the sewer. He said "I have great doubts whether it is made out that these houses used the sewer within the meaning of the section. The sewage from them flowed to an open ditch, where it was a nuisance, but no nuisance to them. That ditch is now covered up, and the sewage flows through it as it formerly did. I do not see how the situation of these houses is im-

proved at all; and if they are to be considered as using the "covered ditch, the argument might go to make property liable for the expense of covering in an open ditch many miles distant." So, in the present case, the nuisance which made the construction of the sewers necessary, in 1859, was no nuisance to the houses in Maynard Street District. "Innocuous," in sect. 22, must mean innocuous to the houses using the ditch, gutter, drain, or watercourse which is a nuisance. [COCKBURN, C. J.—The whole question turns upon the meaning of the word "using." I strongly incline to think that every one uses a drain, the sewage from whose house communicates with it. The only restriction upon the power of the Local Authority to assess is that established by *Regina v. Tatham*, 8 E. & B. 915 (E. C. L. R. vol. 92), namely, that they cannot assess property out of their district. But there is nothing in the Act to prevent them from constituting several districts into one aggregate district, and assessing all property which uses the drainage within that district.] Four separate and distinct districts having been first constituted, houses in any one of them, which have been assessed there and derive no benefit from the sewers in the others, ought not to be re-assessed in respect of those sewers. [COCKBURN, C. J.—The case appears to me to fall exactly within the language of sect. 22; and such a construction is clearly just and equitable.]

Honyman was not called upon to argue in support of the rule.

Per CURIAM.(a)—The rule must be made absolute.

Rule absolute.

(a) Cockburn, C. J., Hill and Blackburn, Js. Wightman, J., was absent.

*The QUEEN v. GOSSE and Another, Justices of SURREY. [277 Nov. 19.

By the Nuisances Removal Act for England, 1855, 18 & 19 Vict. c. 121, s. 22, whenever any drain used for the conveyance of sewage from any house, buildings, or premises, is a nuisance, and cannot, in the opinion of the Local Authority, be rendered innocuous without the laying down of a sewer, the Local Authority are empowered and required to lay down such sewer, and are authorized and empowered to assess every house, building, or premises using the same, to such payment as they shall think just and reasonable. By sect. 3, in a place where a nuisances removal committee constitutes the Local Authority, the surveyors of highways for the time being of such place are made ex officio members of the committee. And by sect. 7, "all charges and expenses incurred by the Local Authority in executing this Act, and not recovered as by this Act provided, may be defrayed" in such a place "out of highway rates, or any fund applicable in aid or in lieu thereof."

A nuisances removal committee having, under sect. 22, laid down a sewer to render innocuous a drain constructed before the passing of the Act by the then surveyors of highways: Held, that whether or not by reason of sect. 7 the highway rates were available as an auxiliary fund towards defraying the expenses thus incurred, the committee were bound, before resorting to that fund, to assess in the first instance, under sect. 22, the houses, buildings, and premises using the sewer.

An order of justices not warranted by the provisions of an Act of Parliament, may be removed into this Court by certiorari, though the Act contains a section taking away the certiorari.

BADELEY had obtained a rule calling upon Henry Gosse and Robert Carter, Esquires, two justices of Surrey, to show cause why a certiorari should not issue to remove into this Court, an order, under their hands and seals, for the payment by the surveyors of highways for

the parish of Ewell of the sum of 502*l.* 4*s.* 3*d.*, being the amount alleged to have been expended for sewers and structural works done by the Local Authority, under The Nuisances Removal Act for England, 1855.

The rule was moved on behalf of William Hobman, a landowner and ratepayer in the parish of Ewell; and the following facts appeared from the affidavits. In the year 1857, a nuisances removal committee was constituted under the provisions of the Act. Before the committee was appointed, there was a drain or sewer *extending
*278] through part of the village of Ewell, for more than 350 yards, into a brook running nearly at right angles to it; and such drain had been used for carrying off the sewage and refuse water from the houses on the west side of the street in Ewell. The then surveyor of highways had enlarged this drain, so as to carry off the sewage from divers of the houses on both sides of the street. The brook into which the drain discharged itself, after receiving the water therefrom, ran through a public horse pond or watering place, much used by farmers and others in the neighbourhood. The water of the brook was also used by the inhabitants of the village for domestic purposes. In the year 1859, the committee, in consequence of numerous complaints being made, determined to make a new sewer; and accordingly they did make a new one, running alongside of and connected with the old sewer, which had been made by the surveyor of highways; and also continued the two together more than 1000 yards beyond the point at which the old sewer ended. By means of side drains a large number of houses were enabled to discharge their refuse into the improved sewer, and the inhabitants derived great benefit therefrom; but William Hobman did not participate in that benefit, inasmuch as his property was as much as a mile distant. The persons who used the side drains paid for the making of them.

On 16th May, 1860, an application was made to the two justices for an order upon the surveyors of highways, for the payment of the sum of 502*l.* 4*s.* 3*d.*, expended by the said committee. It appeared that the surveyors had that amount in their hands, ready to be paid.
*279] No assessment of the houses or buildings using the sewers *had been made; and the committee alleged they were entitled to get the amount from the surveyors of highways, in consequence of the expenditure having been incurred for the public benefit and advantage. The two justices made the order.

Garth now showed cause.—The order was rightly made. By The Nuisances Removal Act for England, 1855, 18 & 19 Vict. c. 121, s. 3, the surveyors of highways are made ex officio members of the nuisances removal committee; it appears, moreover, from the affidavits, that before the Act was passed the former surveyors of highways for Ewell had taken to and enlarged the drain which has been turned into an improved sewer by the committee; and that the present surveyors have funds in hand sufficient to satisfy the committee the expenses of the improvement. All these circumstances show that it is right and proper that the surveyors should be called upon to make this payment. Sect. 7 of the Act enacts that "All charges and expenses incurred by the Local Authority in executing this Act, and not recovered as by this Act provided, may be defrayed" "out of

highway rates, or any fund applicable in aid or in lieu thereof, where the Local Authority is a highway board, or a nuisances removal committee." As the highway surveyors form part of the committee, there was in fact no necessity for an order of justices on them to pay the money over to the committee. The other side will contend that, before having recourse to the highway rates, the committee were bound to proceed under sect. 22, which, after authorizing them to render a nuisance innocuous by laying down a sewer, or some other structure, empowers them to assess every house, *building, or [*280 premises using the sewer or other structure, to such payment as they shall think just and reasonable. Assuming, however, that the improvements in the old drain which have been effected by the committee, in the present case, are such structural sewerage works as are contemplated by that section; still, in such a case, where the works have been executed for the benefit of the whole of the public, the committee are justified in defraying the expense out of the highway rates instead of levying it by assessment. [COCKBURN, C. J.—Many of those who contribute to the highway rates may derive no benefit from, and make no use of, the sewers. It appears just and reasonable that, as sect. 22 points out, the houses, &c., which derive benefit should be assessed in the first instance.] That section leaves the committee a discretion. But, further, sect. 39 enacts that no "order, nor any other proceeding, matter, or thing done or transacted in relation to the execution of" the "Act," shall "be removed or removable by certiorari" "into any of the superior Courts." The justices had power to make the order now in dispute, and the applicant has mistaken his remedy in seeking to remove it into this Court. By sect. 22 the provisions of that section are to "be deemed to be part of the law relating to highways in England." By The General Highway Act, 5 & 6 W. 4, c. 50, s. 44, the surveyors of highways are required, yearly, to make out their accounts and lay them before the justices at a special Sessions for the highways; and any one chargeable to the highway rate may then complain to those justices with respect to such accounts, or the application of the moneys received by the surveyors. That, therefore, was the course which the applicant ought to have adopted.

**Badeley*, *contra*.—Conceding that the works which the nuisances removal committee have executed are beneficial to the [*281 public, the real question is not thereby affected; being whether the justices had any jurisdiction to make an order for the payment of the expense out of the highway funds, until the means of raising the money provided by sect. 22 had been first exhausted. That section shows clearly that the policy of the Legislature is that those parties who create, and those who benefit by the suppression of, a nuisance, shall bear the charges consequent upon its abatement, to the extent of their ability to pay. At most the effect of sect. 7 is to make the highway rate an auxiliary fund, which may perhaps be resorted to if the whole expense cannot be raised by assessment under sect. 22: but not otherwise. (He was then stopped.)

COCKBURN, C. J.—Mr. *Badeley* has said enough to satisfy us that this rule must be made absolute. The affidavits show clearly that the works which have been executed fall within the provisions of sect. 22

of the Act; and it follows that the fund pointed out by that section is the fund primarily chargeable with the expense of them. It is unnecessary to determine whether, if that fund failed, the nuisances removal committee could, under sect. 7, resort to the highway rate to make up the deficit; for there is nothing to show us that recourse has been had in the first instance to the proper fund. It is further said that sect. 39 takes away the jurisdiction of this Court to issue the certiorari; but that section can apply only to cases in which the justices *282] have jurisdiction. It cannot be said that they have jurisdiction to make an order clearly contrary to the provisions of the Act; or that sect. 39 protects such an order when made.

Rule absolute for a certiorari.

It was agreed that the order, when brought up in obedience to the writ, should be quashed.

MATTHEWS v. GIBBS and others. Nov. 15, Nov. 19.

Defendants, London merchants, by charter-party made between them and C., the master of the ship *Planter*, chartered that ship to bring a cargo of guano from Callao to England. The ship was, by the charter-party, consigned outwards to defendants' agents in South America; and freight at 70s. per ton was made payable on her arrival in England, deducting such advances on account of freight as charterers' agents might, as the charter-party empowered them, make to C. in the Pacific. The *Planter* arrived at Callao, loaded her cargo of guano, and set sail for England, defendants' agents having, previously to her sailing, made large advances to C. on account of freight. Soon after sailing she sprang a leak, which compelled her to put back to Callao, and she arrived there the second time, consigned to a firm independent of defendants or their agents. It was then found that she could not proceed on her voyage, and C., defendants' agents refusing to interfere, transhipped the cargo into another ship, *The Alarm*, to be forwarded to England. For this purpose a charter-party was entered into between plaintiff, the master and apparent owner of *The Alarm*, and C. in his own name; under which freight was made payable by the consignees, on ship's arrival in England, at 70s. per ton. Plaintiff then made out bills of lading, in which C. was named as shipper and defendants as consignees. At the date of this latter charter-party the current rate of freight at Callao was only 40s. per ton, and it was agreed between plaintiff and C. that plaintiff should pay the difference between that and the charter-party freight to C., but whether for C.'s benefit or that of his owners did not appear. The cargo arrived in England, in *The Alarm*; when plaintiff claimed from defendants the full freight of 70s. per ton; from which defendants, on the other hand, insisted on their right to deduct the advances made to C. by their agents at Callao. Defendants having paid the freight less the amount of such advances, plaintiff brought this action to recover that amount.

A verdict having been taken, by consent, for plaintiff, for this amount, leave being reserved to defendants to move to enter it for them, the Court to have power to draw inferences of fact from the above facts, which were proved at the trial: Held, making absolute a rule to enter the verdict for defendants: First, that the proper inference from the facts was that C. made the charter-party with *The Alarm* as agent for his owners and not for defendants; the agreement by plaintiff to return him part of the charter-party freight being a legitimate transaction in that view, but a gross fraud on defendants, to which plaintiff was a party, in the other. Secondly, that assuming C. to have made the said charter-party as defendants' ostensible agent, he had no implied authority, from the necessity of the case, on transhipping the cargo, to bind defendants to payment of a higher than the current rate of freight; and plaintiff had knowledge of that want of authority. Thirdly, that, apart from *The Alarm* charter-party, plaintiff had no lien on the cargo for a greater amount of freight than the balance due after crediting defendants with the advances to C.; for that assuming (a point which the Court did not decide), that upon a transhipment of cargo arising from necessity, in a port of distress, in order to its being forwarded to its destination, the original shipowner can transfer his lien for freight to the substituted shipowner, he can transfer no greater right of lien than he himself possesses.

. DECLARATION for money payable by defendants to plaintiff for

freight of goods, and in respect of *plaintiff having, at the request of defendants, delivered up to defendants certain goods [*283 on which plaintiff had a lien for freight, and thereby waived the said lien; and upon an account stated.

Pleas. 1. Except as to 302*l.* 14*s.* 9*d.*, Never indebted. Issue thereon. 2. Except as aforesaid, Payment. Issue thereon. 3. As to 302*l.* 14*s.* 9*d.*, Payment into Court. Replication of damages ultra. Issue thereon.

At the trial before Cockburn, C. J., at the sittings in London, after last Hilary Term, a verdict was taken for the plaintiff, by consent, for 700*l.*, and leave was reserved to the defendants to move to enter it for them: the Court to have power to draw, if necessary, inferences of fact from the evidence adduced, which consisted of the examination of the plaintiff, taken in London, and of depositions of C. E. Stubbs and M. Crosby, taken under a commission in Lima; together with certain material documents.

The action was brought to recover the balance of freight for a cargo of guano, in the ship *Alarm*, from Callao to England, after giving credit to the defendants for 3600*l.*, paid by them before action.

The facts were as follows: The defendants, merchants of London, trading under the name of Anthony Gibbs & Sons, in October, 1857, chartered an American vessel called *The Planter*, to proceed from Liverpool to South America, and bring a cargo of guano thence to the United Kingdom. The following are the material parts of the charter-party, which was signed by the defendants and by J. D. Carlisle, who was master of the ship, but whether owner also, as stated in the charter-party, did not appear.

“London, October 12th, 1857.

“Charter-party.

“It is hereby mutually agreed between Captain *Carlisle, [*284 owner of *The Planter*, *frds* veita, 1988 tons register, new measurement, on the one part, and Messrs. Anthony Gibbs & Sons, merchants and agents, on the other part, as follows. That the said vessel, now lying at the port of Liverpool, shall sail on or before 1st November, 1857, to Melbourne, and thence proceed with all convenient despatch to the port of Callao, Peru, where the captain shall immediately report his vessel, to Messrs. William Gibbs & Co., of Lima. That the said vessel being then tight, staunch, and strong, and well-conditioned for the voyage, Messrs. William Gibbs & Co. shall, within forty-eight hours after such report being received, send to the captain, or his agents, orders for loading a cargo of guano at the Chincha Islands, to which place the vessel shall at once proceed, calling on her way at Pisco to obtain the necessary pass to land, which shall be given to the captain by the charterers' agents, free of expense, within twenty-four hours of his application. After completing her load of guano, and having obtained the necessary pass from Pisco, the vessel shall return for her final clearance to Callao, where the captain shall have the liberty of taking in passengers, light goods, and specie on freight for the benefit of the ship. The charterers to have the option of shipping light goods at current rates.” “The owners of the vessel to pay all port charges, and the ship to be consigned to Messrs. William Gibbs & Co.,

of Lima, to whom the customary agency for doing the ship's business shall be paid by the owners. The captain to sign bills of lading at such rates of freight as the charterers, or their agents, may direct, and without prejudice to this charterparty. The said vessel shall, after completing her loading as before mentioned, proceed to any safe port in the United Kingdom or the Continent, not south of Ostend nor north of *285] *Hamburgh*, nor in the Baltic, calling at *Cowes* for orders from Messrs. Anthony Gibbs & Sons (and for which she is to remain until return of post from London), unless ordered in writing to proceed to any given port by Messrs. William Gibbs & Co.; and there, according to bills of lading and charter-party, deliver the cargo, which is to be discharged and taken from alongside at the rate of no less than thirty-five tons per working day. The freight to be paid in manner hereinafter mentioned, at the rate of 70s. sterling in full, per ton of 20 cwt. net weight of guano at the Queen's beam, subject, however, to a deduction from the water contained in damaged guano. The master to be supplied, in the Pacific, with a sum not exceeding 1500*l.*, free of interest and commission, but the cost of insurance to be borne by the owners; and the amount so to be advanced, and the cost of insurance thereof, shall be in part payment of the freight, at the rate of 50*d.* per dollar currency. And should the charterers or their agents think fit to advance the master beyond the said sum of 1500*l.*, any sum for repairs, stores, or other disbursements whatsoever, such sums, with interest, commission and insurance, shall be in part payment of freight at the exchange aforesaid. And it is hereby expressly agreed that the receipt of the master for any such sum or sums of money as shall be supplied or advanced to him by the charterers as aforesaid, shall be conclusive and binding upon the owners; and they shall thereby be prevented, as between them and the charterers, from inquiring into the necessity for, or appropriation of, the sum of money which, in such receipt or receipts shall be acknowledged to have been received; and all contributions to general average losses which (if *286] any) shall become payable in respect of any such advances as aforesaid, shall be borne and paid by the owners. The freight to be paid in manner following, that is to say, 2000*l.* in cash on arrival at the port of discharge, three months' interest at the rate of 5*l.* per cent. per annum being deducted, and the balance, after deducting all such sums of money as shall become payable to the charterers under the provisions herein contained, on the true and right delivery of the cargo, by bills upon Messrs. Anthony Gibbs & Sons, at three months' date, or in cash, less interest at 5*l.* per cent. per annum, at charterers' option. The charterers are hereby authorized to retain and deduct from the freight all such damages and sums of money, as well liquidated as unliquidated, to which the owners shall become liable to the charterers by virtue of or in any wise in relation to, this charter-party, it being the intention of the parties that all claims and demands, of whatever nature; which shall accrue to the said charterers, shall be treated as payments made by the charterers on account of freight. The charterers to have the liberty of naming the docks in which the ship is to discharge."

The Planter proceeded to Callao, and duly loaded a cargo of guano at the Chincha Islands, and returned thence to Callao, and received

final orders from Messrs. William Gibbs & Co., of Lima, to sail for England. She set sail, accordingly, in May or June, 1858. Previously to her sailing, W. Gibbs & Co. had advanced to Carlisle, the master, 1018*l.* 12*s.* 6*d.*, and had received his receipt for that amount. Soon after sailing, the Planter was compelled to put back to Callao, having sprung a leak; and she was then consigned to Messrs. Crosby & Co., of Callao. It having been ascertained, by survey, that it would be necessary to discharge her cargo, Carlisle, *the master, W. Gibbs & Co. declining to interfere,^(a) engaged two other American vessels, the Alarm, and the H. D. Brookman, to take the cargo to England; and the cargo was accordingly transhipped into those two vessels.

The charter-party of the Alarm, which was signed by Carlisle and the plaintiff was, so far as is material, as follows:

"Callao, June 18th, 1858.

"Charter-party to take ship Planter's cargo.

"It is hereby mutually agreed between Nathaniel Matthews (plaintiff), "master and owner of the ship Alarm, 1184 tons register; new measurement, on the one part, and John D. Carlisle, master of the ship Planter, on the other part: That the said vessel, then being tight, staunch, strong and well conditioned for the voyage, after completing her loading of guano at Callao, where the captain shall have the liberty of taking in passengers, light goods and specie on freight, for the *benefit of the ship; the charterers to have the option of shipping the light goods at current rates;" "shall" "proceed to any safe port in the United Kingdom, calling at Cowes for orders from Messrs. Anthony Gibbs & Sons (and for which she is to remain until return of post from London), unless ordered in writing to proceed direct to any given port by Messrs. William Gibbs & Co.; and there, according to bills of lading and charter-party, deliver the cargo, which is to be discharged and taken from alongside at the rate of not less than thirty-five tons per working-day. The freight to be paid, in manner hereinafter mentioned, at the rate of 70*s.* sterling, in full, per ton of 20 cwt. net at the Queen's beam, subject, however, to a deduction for the water contained in damaged guano. The master to be supplied in the Pacific with a sum not exceeding 1*l.*" &c. (the clause proceeded totidem verbis with the corresponding clause in the charter of The Planter.) "The freight to be paid in manner following, that is to say, 1180*l.* in cash on arrival at the port of discharge, three months' interest at the rate of 5*l.* per cent. per annum being deducted, and the balance, after deducting all such sums of money as shall become payable to the charterers under the provisions

(a) It appeared on the evidence that the charter-party and bill of lading of The Alarm were on forms supplied by W. Gibbs & Co., and that she was examined at their suggestion and approved by their surveyor. Also that several interviews took place between them and the captains of all three ships, Callao being only six miles from Lima. The presumption, however, from these facts that W. Gibbs & Co. were parties to the transshipment of the cargo, as agents for the defendants, was displaced by the deposition of C. E. Stubbs, the acting partner in the firm of W. Gibbs & Co., who stated that he refused to interfere, The Planter, on putting back, not being consigned to his firm, and as he considered that Carlisle was bound to act in the best way for all concerned. He also stated that he supplied the forms as an act of courtesy, to save trouble; and that Carlisle informed him that the chartered freight of The Alarm was to be 40*s.*, and he did not see the charter-party till a copy was sent, with the bills of lading, to his firm for the defendants.

herein contained, on the true and right delivery of the cargo, by bills upon Messrs. Anthony Gibbs & Sons, at three months' date, or in cash less interest at 5 $\frac{1}{2}$ per cent. per annum, at charterer's option. The charterers are hereby authorized to retain and deduct from the freight all such damages and sums of money, as well liquidated as unliquidated, to which the owners shall become liable to the charterers by virtue of, *289] or in anywise in relation to, this charter-party; *it being the intention of the parties that all claims and demands, of whatever nature, which shall accrue to the said charterers, shall be treated as payments made by the charterers on account of freight. Messrs. Anthony Gibbs & Son shall have the right to name the dock in which the ship is to discharge."

The plaintiff, as master of The Alarm, signed bills of lading which, together with a copy of the charter-party, were forwarded, through W. Gibbs & Co., to the defendants, and which were as follows.

"Callao, August 6th, 1858.

"Shipped in good order and condition, by Capt. J. D. Carlisle, of the ship Planter, at Callao, Chinha Islands, in and upon the good ship or vessel called The Alarm, now lying at Callao, and bound for Cowes for orders, whereof Nathaniel Matthews is master for this present voyage, a cargo of guano, of 1184 tons register, 1545 sacks, to be delivered in like good order and well conditioned at the aforesaid port to which the vessel may be ordered to discharge; all and every the dangers and accidents of the seas and of navigation, of whatever nature or kind soever, excepted; unto Messrs. Anthony Gibbs & Sons, or to their assigns, they paying freight for the said guano as per charter-party. N. MATTHEWS."

Though the freight payable under the charter-party of The Alarm was to be 70s. per ton, the current rate of freight at Callao was then only 40s.; and it was agreed between the plaintiff and Carlisle that the plaintiff should pay the difference of 80s. between the two rates to Carlisle; but whether for the benefit of the owners of the Planter *290] or of Carlisle himself did not appear; *nor did it appear whether Carlisle was the real owner of The Planter. (a)

(a) The plaintiff swore in his examination that, having already advanced 500*l.* to Carlisle, he gave him a draft for the balance before sailing from Callao; and he also swore that he did not know of the advances made by W. Gibbs & Co. to Carlisle, until his arrival in England. M. Crosby, however (of the firm of Crosby & Co. of Callao), in his deposition stated that "at the time of the final closing of accounts, after The Alarm and The H. D. Brookman were loaded, there were many questions which arose between the three captains, which were the cause of a good deal of contention, and several letters and certificates passed between them. One of the contested points, according to deponent's recollection, was the advance received by the master of The Planter from William Gibbs & Co., of Lima: and deponent thinks that Captain Carlisle, of The Planter, gave each captain an order on some house in Liverpool (deponent thinks on the house of Richardson, Spence & Co.) for the said amount advanced by William Gibbs & Co. to the master of The Planter, in case the house of Anthony Gibbs & Sons should deduct the same from the freights of The Alarm and The H. D. Brookman; and deponent is quite certain that both the captains of The Alarm and The H. D. Brookman did not know of any such advance until their ships were loaded; and then they, the said captains of The Alarm and The H. D. Brookman, were more or less at the mercy of the master of The Planter; and they, the masters of The Alarm and The H. D. Brookman, made the best arrangements they could to recover said advance, should it be deducted by Anthony Gibbs & Sons; but that, although deponent was at the time fully cognizant of the above mentioned occurrences, he cannot recollect whether he was consulted or not by the masters of The Alarm and The H. D. Brookman, but recollects having consulted with the master of The Planter. The ship Planter was consigned to the house represented by him, on putting back to Callao in the

The Alarm sailed from Callao in August, 1858, and duly arrived in England, and proceeded, by order of the defendants, to London, there to discharge at the Victoria *Docks. The defendants entered the cargo in their own names; but when the plaintiff [*291 applied to them to pay him the whole freight at 70s., as per charter-party, they claimed to deduct the 1018*l.* and other small sums, which their agents, W. Gibbs & Co., had advanced to the captain of The Planter. In order to prevent delay and consequent demurrage, the following agreement was then entered into between the plaintiff and the defendants.

"London, December 14th, 1858.

"It is agreed between the undersigned, in order to prevent delay in discharging the cargo of The Alarm, that the discharge shall proceed, and the delivery be made to Messrs. Anthony Gibbs & Sons, the consignees named in the bill of lading; they undertaking to pay the freight according to the charter-party, less the proportion of the sum of 1089*l.* 9*s.* 4*d.* advanced by Messrs. A. Gibbs & Sons on account of freight to the captain of The Planter, in whose vessel the cargo now in The Alarm, as well as that by The H. D. Brookman, was originally shipped; it being understood that this arrangement shall not prejudice the owner's right to recover the balance claimed for freight upon the cargo in The Alarm, nor the right of Messrs. A. Gibbs & Sons to have the said cargo delivered to them without paying any freight, or after deducting the said sum of 1089*l.* 9*s.* 4*d.*, or a proportionate part thereof."

Payments were accordingly made by the defendants on account, before action, to the amount of 8600*l.*, which, together with the amount paid into Court after action brought, it was agreed, reduced the plaintiff's claim to 700*l.*: which sum, being the amount for which the verdict was taken, was agreed to be The Alarm's *pro- [*292 portion of the 1089*l.* 9*s.* 4*d.* advanced to the captain of The Planter, distributing the whole advances between The Alarm and The H. D. Brookman in proportion to the bulk of their respective cargoes.

Sir William Atherton, Solicitor-General, in last Easter Term obtained a rule, pursuant to the leave reserved, to enter a verdict for the defendants, on the grounds, first, that the sum paid into Court satisfied the whole of the plaintiff's claim; secondly, that the defendants were entitled to the benefit of the advances made to the captain of The Planter; thirdly, that the said captain had no authority to make the charter with The Alarm for 70s., so as to bind or affect the defendants; fourthly, that the guano was the property of the defendants, and the plaintiff had no legal lien.

Bovill and *J. Kaye* now showed cause.(a)—First, the defendants are not entitled to deduct from the plaintiff's claim the advances made by W. Gibbs & Co. to the captain of The Planter, for the plaintiff swears, and the facts show, that he was not informed by them, and

month of June, 1858. Considering that the house which he represents were the consignees of The Alarm and The H. D. Brookman, he must have considered it his duty to warn the masters of the said vessels of the advance received by the master of The Planter on account of freight; and therefore he has very little doubt but that he did so in due course, although unable at the present moment positively to swear to the fact."

(a) Thursday, November 15th.

did not know, before his arrival in England, that those advances had been made. Secondly, assuming the facts to be that W. Gibbs & Co. were no parties to the transshipment of the guano from The Planter to the Alarm, but refused altogether to interfere, still, Carlisle, the master of The Planter, had, under these circumstances, authority as master to bind the defendants, as owners of the cargo, to payment of the 70s. per ton, the charter-party freight agreed upon between him and the plaintiff. If transshipment of the goods becomes necessary, in the *293] *course of the voyage, by reason of the inability of the original ship to carry them any further; and if the charterers' agents being thereupon applied to by the master, refuse to interfere; the necessity and exigency of the case gives the master authority to bind, as agent, the charterers as well as his owners to the terms of the transshipment. The law upon this subject is clearly stated, as follows, in Kent's Commentaries, vol. 3, p. 296 (ed. 10; p. 212 of original edition). "The English rule undoubtedly is, that if the ship be disabled from completing the voyage, the shipowner may still entitle himself to the whole freight by forwarding the goods by some other means to the place of destination; and he has no right to any freight, if they be not so forwarded, unless it be dispensed with, or there be some new contract upon the subject. In this country(a) we have followed the doctrine of Emérigon, and the spirit of the English cases, and hold it to be the duty of the master, from his character of agent of the owner of the cargo, which is cast upon him from the necessity of the case, to act in the port of necessity for the best interest of all concerned; and he has powers and discretion adequate to the trust, and requisite for the safe delivery of the cargo at the port of destination. If there be another vessel, in the same or in a contiguous port, which can be had, the duty is clear and imperative upon the master to hire it; but still the master is to exercise a sound discretion adapted to the case. He may tranship the cargo, if he has the means, or let it remain. He may bind it for repairs to the ship. He may sell part, or hypothecate the whole. If he hires another vessel for *the completion *294] of the voyage, he may charge the cargo with the increased freight, arising from the hire of the new ship." In *Shipton v. Thornton*, 9 A. & E. 314, 336, 337 (E. C. L. R. vol. 36), it was held that, whether or not the master of a general ship, which is prevented from completing the voyage by damage occasioned by tempest, is bound, he is at any rate at liberty, if he has an opportunity and thinks fit, to forward the goods, shipped on board, to the place of destination, by some other conveyance equally cheap; and is entitled, if the goods, so transhipped, arrive at their destination and are obtained by the freighter, to the whole freight originally contracted for; though the goods are carried by the second conveyance for less than the freight originally contracted for. In delivering the judgment of the Court, which contains a careful review of the authorities, Lord Denman, C. J., says, "One question" "has been asked, which it will not be right to pass over. What, it has been said, if the transshipment can only be effected at a higher than the original rate of freight? Which party is to stand to that loss? By the French Ordinance and the Code de Commerce, and according to the decisions in America (to which Chan-

(a) i. e. America.

cellor Kent refers), the shipowner is entitled to charge the cargo with the increased freight, and, as a consequence of that rule, it becomes an average loss; and, in case of an insurance, must be made good by the insurers; *Émérigon, Traité des Assur.* ch. xii. s. 16, *Code de Com.* 350. No case of the sort that we are aware of has occurred in this country; nor is it necessary for us to express any opinion further than as it bears on the present *question. It may well be that the master's right to tranship may be limited to those cases in [*295 which the voyage may be completed on its original terms as to freight, so as to occasion no further charge to the freighter; and that, where the freight cannot be procured at that rate, another but familiar principle will be introduced, that of agency for the merchant. For it must never be forgotten that the master acts in a double capacity, as agent of the owner as to the ship and freight, and agent of the merchant as to the goods: these interests may sometimes conflict with each other; and from that circumstance may have arisen the difficulty of defining the master's duty under all circumstances in any but very general terms. The case now put supposes an inability to complete the contract on its original terms in another bottom, and, therefore, the owner's right to tranship will be at an end; but still, all circumstances considered, it may be greatly for the benefit of the freighter that the goods should be forwarded to their destination, even at an increased rate of freight; and, if so, it will be the duty of the master as his agent to do so. In such a case, the freighter will be bound by the act of his agent, and of course be liable for the increased freight." That decision is a clear authority that the defendants in the present case are liable, the cargo having been transhipped from *The Planter* to *The Alarm* on the original terms as to freight, and no further charge having been occasioned to the freighters, the defendants. [COCKBURN, C. J.—The chief question is, as whose agent did Carlisle, the master of *The Planter*, act in making the transhipment? Did he not act merely in the interest of his owners, to enable *them to earn the original freight? *Hill, J., Shipton v. Thornton*, 9 [*296 *A. & E.* 314 (*E. C. L. R.* vol. 36), decides that the master, acting for his principals, his owners, may do all that is necessary, by transshipping the cargo, to enable them to earn their original freight. The passage cited from the judgment shows that, if the freight on transshipment is higher than that original freight, the question arises whether the necessity of the case was such as to authorize the master to act as agent also for the cargo owners, and bind them by his contract to pay the higher rate. Such a question, however, cannot arise here; for whereas the original freight was 70s. a ton, the current freight from Callao, at the time of the transshipment, was only 40s. Moreover, in cases where the question does arise, Lord Denman, C. J., proceeds to say that as "circumstances make it necessary, on the one hand, to repose a large discretion in the master," "the same circumstances require that the exercise of that large discretion should be very narrowly watched."] The other side will rely on *Gibbs v. Grey*, 2 *H. & N.* 22; but that case is distinguishable. It was there held that the master of a disabled ship could not make a special contract, binding the owners of cargo transhipped therefrom, for the conveyance of the cargo in a substituted ship to its destination: but the

judgment proceeded on the ground that the cargo owners had an agent, to the knowledge of the master, at the port of distress, and that the master had not, as he was bound to do, communicated with that agent, or given him the option of receiving the cargo there. The facts of the present case bring it within the principles laid down by Lord Stowell, *297] then *Sir Wm. Scott, as to the power of the master to bind the owners of the cargo, in his judgment in the *Gratitudine*, 3 Rob. Ad. Rep. 240, 273, as follows. "The Court would, undoubtedly, be very unwilling to relax the general obligation of masters to correspond with the proprietors, where it is practicable: but, taking the obligation to be such, the master *has* complied with that obligation; he applied to the correspondent of the principal consignee, and through him to the consignee who is described as owner of a part of the cargo. From him he received an answer sent by that consignee and proprietor," "expressly declining to give particular directions, and referring him entirely to his own discretion. From that conduct, I think that all the authority that might become necessary for the preservation of the cargo, was devolved upon him by the very act of the consignee, even if he had not possessed it under the general law: for if he was remitted to his own discretion, everything then which he did under that discretion, justly exercised, was expressly warranted by the act of his employer, so far at least as the interests of that particular employer were concerned." In that case it was held that, in a case of distress, a master may hypothecate his cargo on freight for repairs in a foreign port, such repairs being necessary for the prosecution of his voyage. And Sir William Scott laid it down that, if the lender, in such a case, has not at all acted unfairly, by taking undue advantage of the master's necessity, the contract cannot be vitiated, either in whole or in part. "It will not be sufficient, either upon principle or upon determinations of the Court," he adds, (a) "that the *298] master has taken undue advantage *against his employer; that is a matter between him and his employer, with which the third person has nothing to do, unless personally implicated by the facts of the transaction, in the fraud that may have been practised."

(The case was then adjourned.)

Sir William Atherton, Solicitor-General, and *Cleasby*, in support of the rule, (b) were not called upon to argue.

COCKBURN, C. J.—We are agreed that the rule must be made absolute to enter the verdict for the defendants. The facts of the case are shortly these. The defendants, who are merchants in London, chartered a vessel called *The Planter* to bring a cargo of guano to this country, at a freight of 70s. a ton. Advances to a considerable amount, on account of freight, were made by the agents of the defendants to the captain of *The Planter* in South America. After the guano had been shipped *The Planter*, in consequence of sea damage, became incapable of proceeding upon her voyage, and, the agents of the defendants declining to take upon themselves the transshipment of the cargo to any other vessel for the purpose of its being conveyed to its destination, the master of *The Planter*, one Carlisle, chartered two vessels for that purpose, in respect of one of which, *The Alarm*, the

(a) 3 Rob. Ad. Rep. 272.

(b) Monday, November 19th.

present action arises. He chartered this vessel in his own name, and took a bill of lading for the cargo shipped in her from the plaintiff, who was the captain; which bill of lading was made out to him as the shipper, the defendants being named therein as the consignees, to *whom the guano was to be delivered in this country. In the [*299 charter-party with The Alarm, Carlisle agreed to pay the same amount of freight as his owners had stipulated for in the original charter-party; but, by a private and subordinate agreement between him and the plaintiff, Carlisle stipulated that while the 70s. per ton should be required of the consignees on the delivery of the cargo, the plaintiff was to keep only 40s. per ton as the rate of freight as between him and Carlisle, and was to hand over to Carlisle, whether for the benefit of him or of his owners does not clearly appear, the difference between the 70s. per ton which was to be received from the defendants and the 40s. per ton for which the guano was to be conveyed to this country. The guano having arrived in the Alarm, the defendants, the consignees, demanded the cargo, offering to pay the difference between the amount of freight at the rate which they had contracted to pay by the original charter-party, namely, 70s. per ton, and the advances which their agents in South America had made to the captain of The Planter. The plaintiff insisted on the payment of the full freight, namely, 70s. per ton. After some discussion, the guano was delivered to the defendants without prejudice to the lien of the plaintiff, if any, for freight.

Three questions arise. First, was the contract made by Carlisle, when he chartered the Alarm, a contract made by him as the agent of the defendants, on their behalf? Secondly, if so, was it one by which the defendants were bound? And, thirdly, supposing the latter question to be answered in the negative, and that the contract entered into by Carlisle with the plaintiff is held to have been made by him as agent of the owners *of The Planter, had those owners a [*800 lien which they could transfer to the plaintiff, so as to entitle the latter to withhold the goods until the whole of the freight had been paid?

I am of opinion that our judgment ought to be for the defendants on all three questions. In the first place, I think the contract entered into between Carlisle and the plaintiff must be considered as a contract entered into by him on behalf of his owners, and not on behalf of the defendants. The charter-party purports to be made by him with the plaintiff in his own name, without any mention of his acting as agent for the defendants. The bill of lading is also made out to him in his own name, as consignor, the defendants being only mentioned as the consignees. I agree that these circumstances are not conclusive. A far more important fact, in considering this first point, is, that by the contract with the plaintiff the rate of freight to be demanded by the plaintiff, as captain of the Alarm, on the arrival of the goods in England, was to be the same as that which the defendants had agreed to pay to the owner of The Planter, whereas the rate of freight actually to be paid to the plaintiff, as between Carlisle, who made the charter-party, and the plaintiff, was a much smaller rate. Now it was perfectly competent to Carlisle, on behalf of the owners of The Planter, to make such a contract: for it is well esta

blished that when the shipowner, who has contracted to carry goods under a charter-party to a given place of destination in a particular bottom, finds that by some vis major he is prevented from fulfilling his contract, it is open to him, for the purpose of carrying out the contract so far as he can, and earning the freight *301] to which he is entitled under it, to forward the *goods to their destination in a substituted bottom; and there is nothing to prevent his doing that upon the most advantageous terms to himself which the circumstances will admit of. If he sends the goods to their destination, it is immaterial to the owners, so long as they get them delivered at the freight agreed on, whether the original shipowner, when obliged to substitute another ship for his own, gets the goods conveyed to their destination at the freight originally agreed upon, or for less; and therefore, if the shipowner, under circumstances authorizing him to tranship the goods, is enabled to get them conveyed at a lower rate of freight, there is no objection to his having the benefit. In this view it was a perfectly legitimate transaction on the part of the master of The Planter, acting for his owners, to make an agreement with the plaintiff that the same rate of freight should be charged to the defendants which, by the original charter-party, they had stipulated to pay; while the substituted shipowner should receive a less freight, the difference going to the benefit of the original shipowners. On the other hand, if Carlisle, in making this contract, had been acting as the agent of the defendants, he would have been guilty of a gross fraud. For it is plain that when the captain of the original shipowner, from the necessity of circumstances, takes upon himself to act as the agent of the owner of the goods, it becomes his duty to do his best for the interest of the latter, and to make the best bargain he can for the conveyance of the cargo to its destination. Therefore, if Carlisle, not deeming it expedient, or finding himself unable, to forward the goods in another bottom on account of his owners, took upon himself, under the necessity of the case, to *302] do so as the agent of the defendants, he would *no longer have any right to look to the interest of his owners: his sole business would be to consider the interest of the owner of the goods. This being so, if he was acting as the agent of the defendants, his agreeing to pay for the conveyance of the guano at the rate of 70s. per ton, when he could have got it conveyed for 40s. would have been a gross act of fraud; and it would have been equally fraudulent in his owners to pocket the difference. Now the plaintiff, who was captain of The Alarm, knew all the circumstances, and would therefore necessarily have been a party to the fraud. On the whole, then, I think that, as the contract entered into by Carlisle with the plaintiff, if made on behalf of his owners, would be a legitimate transaction, whereas, if made by him as the agent of the defendants, it would be grossly fraudulent, and this to the knowledge of the plaintiff; the proper inference from these facts is, that it was a contract entered into by him on behalf of his owners, and therefore that it is not binding on the defendants.

In the second place, looking at the case irrespective of this consideration, let us see whether, even if Carlisle did enter into this contract of charter-party with the plaintiff, as agent of the defendants, he could

bind the defendants by the contract. I am clearly of opinion that he could not. I am not disposed to question the doctrine, in support of which *Shipton v. Thornton*, 9 A. & E. 314 (E. C. L. R. vol. 36), was cited, that the master of a trading vessel, although primarily the immediate agent of the shipowner, yet, if the vessel in which the cargo has been shipped becomes incapable of conveying it to its destination by the *intervention of some vis major, and the shipowner will not or cannot transmit the goods to their destination, has, arising out of the necessity and exigency of the circumstances, an implied authority to act as the agent of the owner of the goods, and to do what may be expedient for sending them to their destination, on the best terms that he can make. But it must be understood that this implied authority of the master is co-extensive with and limited by the necessity out of which it arises, just as it also is where he acts, under extraordinary circumstances, as the agent of his owners, with regard to pledging their credit, or the ship itself, for necessities for the ship. This is obviously reasonable with reference to those with whose interests the master is dealing in their absence: while there is nothing unreasonable in requiring of a person making a contract with a master, whether acting on behalf of the shipowner or of a goods owner, that, knowing that the implied authority of the master arises out of the necessity of the case, and having, from being on the spot, every opportunity of inquiry, he shall take all reasonable means to satisfy himself of the existence of the necessity out of which alone the authority can arise. Now, in this case, it is clear that there was no necessity for the contract into which Carlisle, the master, entered. There might be a necessity, indeed, under the particular circumstances of the case, for his procuring other vessels, in order to transmit the cargo to its place of destination; but there was none for his entering into a contract to pay freight at the rate of 70s. per ton. And not only was this so, but the absence of any such necessity was known to the plaintiff, seeing that by the contract with him it was stipulated that, while 70s. a ton should be demanded of the defendants, the guano *should actually be conveyed at 40s. per ton. I am of opinion, therefore, that the [*304 contract, if entered into by the captain as agent of the defendants, was bad on two grounds: first, as being fraudulent, and fraudulent to the knowledge of the plaintiff: secondly, as being beyond the limits of any authority which the captain could exercise in the position in which he was placed.

There being, then, no contract to bind the defendants, we come to the remaining question, namely, whether, if the contract with the plaintiff be considered as one entered into by Carlisle on account of his owners, there is any right of lien in the plaintiff which could entitle him to withhold the delivery of the goods from the defendants: for it was agreed that the goods should be given up without prejudice to any lien of the plaintiff; and, if any lien existed beyond the amount which has been paid, the plaintiff must succeed in this action. The question turns upon whether the defendants are entitled to deduct, as against the plaintiff, the advances made on account of freight to the owners of *The Planter*. And here a question presents itself which may be open to some doubt. Although the original ship-

owner may be entitled, on account of the physical impossibility of conveying the goods to their destination in the bottom originally contracted for, to employ another to convey the goods and receive the freight, can he, when he parts with the possession of the goods, transfer his right of lien to the substituted shipowner? I by no means desire to be understood as saying that he cannot. It may be that the same rule of law which empowers the original shipowner, under circumstances of necessity, to tranship the goods, and, by sending them to the place of delivery in another ship, to retain his right to recover *305] the freight as against the owner of the goods, gives also, at the same time, as incidental to this right, that of transferring also the lien which he would have had upon the goods for the freight, if he had himself conveyed them to their destination. But it is not necessary to decide that question in the present case. It is enough to say that, supposing the right exists to transfer the lien under such circumstances from one shipowner to the other, at all events the first can transfer to the other no greater right of lien than he himself possessed. The utmost which the plaintiff can claim, if the second charter be considered, as it must be, as one between Carlisle and him, is to stand in the shoes of the original shipowners, for whom Carlisle was acting. Then, what was the lien which these owners had at the time the goods were transferred? Not a lien on the goods for the whole of the freight; for considerable advances had been made on account of the freight, and the lien of the owners of *The Planter* remained only for the residue. The defendants were entitled to demand the delivery of their goods, had they been in the hands of the original shipowners, on payment of the balance, and the lien of such shipowners could exist only for that balance. The plaintiff, who is substituted for the original shipowners and stands in their place, can be in no better condition; and therefore, on the payment of the balance due on the original charter-party, the defendants were entitled to the delivery of their goods, in whosoever hands they were, at the place of delivery. In addition to the sums paid on account of freight to the plaintiff, the defendants claimed to deduct the amount of the advances made to the master of *The Planter*; and on this action being brought, they paid the amount of the balance into Court. I am of *306] opinion that the plaintiff could have no lien beyond that amount, and, consequently, that the plaintiff is not entitled to retain his verdict on the ground of lien. I am of opinion, therefore, that the rule should be made absolute.

(WIGHTMAN, J., was absent.)

HILL, J.—I am of the same opinion. My Lord has entered so fully into all the points that I do not feel it necessary to add anything.

(BLACKBURN, J., was absent.)

Rule absolute.

It seems a difficult thing to discover other, as the point is presented for the party who ought to pay the excess decision to different tribunals. The of freight incurred by a transhipment contrariety of opinion which prevails of the cargo. The insurer, freighter, indicates the difficulty of solving the and carrier alternately succeed in problem. *Émérigon*, starting from the shifting the burden from one to the position that the master earns his

freight, if he is unable to obtain another vessel, contends that if he does procure another ship and forwards the cargo, the additional expense falls upon the owner. "The captain is obliged to hire another vessel only in his quality of factor. He is, therefore, to have the choice either of claiming his freight in entirety, in which case the freight of the substituted vessel is at his charge, or of reducing his freight in proportion to the voyage accomplished, in which case the freight of the substituted vessel is at the charge of the goods saved." Meredith's Ed. 345. It being the duty of the master to forward the cargo: *Id.* 342-3-4; *Pardeanus, Droit Com.*, Nos. 715 and 644; *Boulay-Paty, Droit Mar.* 400, 405. A vessel from Callao to Baltimore was brought into Pernambuco and condemned. *Ingraham, First Judge*: "The evidence shows the arrival of the vessel, with her cargo, at Pernambuco, where she was condemned and the cargo reshipped for the port of destination by the captain. So far as transporting the cargo to Pernambuco, on the passage homeward, was performed, a rateable proportion of freight was earned. * * There is no doubt, under our law, that the master was not only justifiable, but that it was his duty, in a case of necessity, to tranship the goods and send them home by another vessel; and where such transshipment is necessary, he may charge the cargo with the extra freight of such renewed voyage. By extra freight is meant the surplus beyond what the freight would have been if no necessity of hiring another ship had intervened." *Worth v. Mumford*, 1 Hilt. (1855) 1.

If the cargo is in a condition fit to be transported, it is the duty of the

master to procure another ship and forward the goods to their destination: *Butler v. Murray*, 3 Tiffany (N. Y. 1864) 88. The master has the right to insist upon the privilege of carrying the goods forward, in order to earn his entire freight, and if the owner interferes with the exercise of his right, he becomes entitled to freight for the portion of the voyage completed: *Merchants' Mutual Ins. Co. v. Butler*, 20 Maryland (1862) 41. See also 1 Parsons' Mar. Law 158; *Flanders on Shipping*, §§ 242, 529.

Pothier and Valin, on the contrary, take the strict view that the master's contract was to carry the cargo in his own vessel, and he is not bound to hire another unless he sets up a claim for the entire freight. The expense of forwarding the goods by another craft falls upon him and goes in reduction of his freight: 1 Valin 651, 653; *Pothier Charte-partie*, No. 68. The principal case, which decides that the original shipowner can transfer to the substituted carrier no right of lien for the excess of freight, goes upon *Pothier's* principle, and assumes that the freighter is only bound to pay the original contract price, and the master must deliver the goods at their destination in order to obtain his freight. *The Flora*, Law Rep. Adm. 45. But if the right of the carrier to the excess of freight be once established, the lien, as incidental to the freight, may be transferred with the cargo to the substituted master: *Bags of Linseed*, 1 Black (U. S. Sup. Ct. 1861) 108.

The notion that the insurer is not bound to indemnify the owner for the increased freight, *Shultz v. Ohio Ins. Co.*, 1 B. Mun. (Ky. 1841) 336, is not sustained: 1 Phillips on Ins., § 1138.

MYERS v. SARL and Others. Nov. 20.

Plaintiff, a builder, by deed contracted with defendants to build for them a house and premises for a certain sum. The deed provided that "no alterations or additions shall be admitted unless directed by the architect of" defendants "in writing under his hand, and a weekly account of the work done thereunder shall be delivered to the said architect or the clerk of the works on every Monday next ensuing the performance of such work; and the delivery of such account shall be a condition precedent to the right of" plaintiff "to recover payment for any such addition or alteration."

In an action by plaintiff to recover the balance due under the contract, the claim including charges for additions and alterations: Held, first, that parol evidence was admissible for plaintiff to explain that the expression "weekly account" was a term of art well known in the building trade, and meant, by the usage of the trade, an account of the day work expended in each week on the additions and alterations, and the materials used in such day work. Secondly, that mere sketches of the manner in which the extra work was to be done, prepared and furnished to plaintiff by defendants' architect, but not signed by him, were not directions in writing under the hand of the architect, within the meaning of the contract.

ACTION to recover an alleged balance due from defendants to plaintiff on a building contract.

At the London Sittings, after Trinity Term, 1858, the case was referred, by consent and by order of Nisi Prius, to an arbitrator, who was empowered to state a case for the opinion of the Court. The arbitrator, on 6th June, 1860, made his award in favour of the plaintiff *for a certain sum; subject to the opinion of the Court on *307] the following case.

The plaintiff was a builder; and by a deed dated 18th October, 1856, and executed by him and the defendants, he contracted and agreed with the defendants to erect and build for them a house and premises for the sum of 8697*l.*, upon the terms and subject to the stipulations and conditions contained in the said deed, a copy of which was annexed to and was to be considered as part of the case. The house and premises were built by the plaintiff, and certain extra works and fittings were done and provided by him in and about the same; and the action was brought to recover the sum of 3783*l.* 4*s.* 8*d.*, being the balance claimed to be due on the contract and the value of such extra works and fittings, after giving credit to the defendants for all sums paid by them on account. By the contract it was provided that "no alterations or additions shall be admitted unless directed by the architects of" the defendants "in writing under his hand; and a weekly account of the work done thereunder shall be delivered to the said architect or the clerk of the works on every Monday next ensuing the performance of such work; and the delivery of such account shall be a condition precedent to the right of" the plaintiff "to recover payment for any such addition or alteration." It was contended before the arbitrator, on behalf of the defendants, that the plaintiff was not entitled to recover for some of the extra work done by him, on the ground that the same was not directed to be done by the architect by any writing under his hand pursuant to the clause in the contract above set out, and also on the ground that *308] no sufficient weekly accounts of such work were delivered *by the plaintiff within the meaning of that clause. With respect to the latter objection it appeared in evidence that certain accounts of the extra work were delivered by the plaintiff as and for weekly

accounts within the meaning of the contract; and it was contended on his behalf that the term "weekly account," as used in the contract, was a term of art well known in the building trade and to all builders and architects, and that parol testimony was admissible to prove its meaning. The admissibility of such evidence was objected to on the part of the defendants. The arbitrator held that the words used were a term of art, and that such evidence was admissible: and he accordingly received the same, and was satisfied thereby that the weekly accounts delivered by the plaintiff of such extra work were sufficient weekly accounts within the meaning of the contract, and accordingly he included the value of such extra work in the amount awarded to the plaintiff. With respect to the objection that the plaintiff was not entitled to recover for part of the extra work, on the ground that the same was not directed to be done by the architect, by any writing under his hand pursuant to the contract, the arbitrator found and determined that, as regards the greater part of such extra work, the same was directed to be done by the architect by sufficient orders or directions in writing under his hand; but as regards a small part thereof, amounting to the sum of 105*l.* 18*s.* 5*d.*, the only evidence of any such orders or directions in writing produced before the arbitrator were certain sketches, indicating the manner in which such extra work was to be done, but not specifying the materials to be used, or containing any absolute order or direction for the execution of such works. These *sketches were all prepared in the [*309 office of the said architect of the defendants, by his clerks and under his directions, and were by his order furnished to the plaintiff, but were not signed by the said architect or his clerks. These sketches were annexed to the case. As regards them the arbitrator held and adjudged that they were not sufficient orders or directions in writing within the meaning of the contract; and accordingly disallowed to the plaintiff the value of the work done under them.

The questions for the opinion of the Court were: First, was the arbitrator right in admitting parol testimony to show the meaning of the term "weekly account," as used in the contract? If the Court should be of opinion that such evidence was inadmissible, the amount awarded to the plaintiff was to be reduced by a certain sum. Secondly, If the Court should be of opinion that the said sketches were sufficient written orders or directions for the execution of the works therein indicated, and that the arbitrator ought to have allowed to the plaintiff the value of such works, the amount awarded to the plaintiff was to be increased by the said sum of 105*l.* 18*s.* 5*d.*

Lush, in this Term, had obtained a rule calling on the plaintiff to show cause why the case should not be remitted back to the arbitrator to be amended in the statement of facts raising the first point. It was ordered that this rule should come on for argument with the special case.

Specimens of the weekly accounts delivered by the plaintiff were attached to the affidavits on which this rule was obtained. These were each headed "Accounts of day work and materials." It was sworn that the plaintiff conceded, before the arbitrator that these [*310 *accounts contained an account of only a very small portion of the additions and alterations arising out of the contract, being confined

to the day work expended in each week on such additions and alterations, and the materials used in such day work; that the defendants contended that accounts of all the work done ought to have been delivered, according to the unambiguous language of the contract; and that the plaintiff then tendered the evidence of architects and builders, to prove that the accounts delivered were sufficient, and that it was the custom, or common practice, in the building trade, to deliver accounts of such matters only as the said accounts contained, and that, in reference to extra works capable of being measured, it was not usual to deliver any account of them; which evidence was objected to by the defendants, but received by the arbitrator.

Bovill (*Tompson Chitty* with him), for the plaintiff.—First, there is no ground for sending back the case to the arbitrator. He was not required, by the submission, to state any points which might arise; but was merely empowered to state a case according to his discretion; and he has set forth sufficient facts to raise the first point.

(The Court here stated that they were of that opinion, and that the rule must be discharged with costs.)

Secondly, the arbitrator was clearly right in admitting parol evidence to explain the term "weekly account," that being, as he has found, a term of art in the building trade. [BLACKBURN, J.—*Grant v. Maddox*, 15 M. & W. 737, is an authority in your favour.]

*311] *Lush*, contra.—The case is not within the principles upon which parol evidence is admissible to explain written documents. The parol evidence, here, was not restricted to the meaning of an ambiguous word or expression, but was admitted to contradict the plain meaning of the words "a weekly account of the work done thereunder," i. e. under the direction of the architect, and to prove that those words were satisfied by the delivery of accounts of extra work not done under such direction. *Grant v. Maddox*, 15 M. & W. 737, is distinguishable. Parol evidence was properly admitted, in that case, to show that, by the word "year" in the contract there in question, the theatrical year was intended. [BLACKBURN, J.—Does not the principle of that decision show that evidence is admissible to explain that, by a "weekly account of the work," an account of certain portions of weekly work was meant? Alderson, B.'s judgment makes strongly against the present defendant. He says, "It is perfectly true that you have no right to qualify or alter the effect of a written contract by parol evidence; but it is perfectly competent to you to qualify or alter by parol evidence the meaning of the words which apparently form the written contract, and to insert the true words which the parties intended to use. That is not to alter the contract, but to show what the contract is. Wherever the words used have, by usage or local custom, a peculiar meaning, that meaning may be shown by parol evidence. Here the contract is, that the plaintiff is to be paid for three years, a salary of 5*l.*, 6*l.*, and 7*l.* per week in those years. That means, according to the evidence and the finding of the jury, that she is to be paid so much per week during every week that the

*312] theatre *is open in those years." You seek to read the words "a weekly account of the work done" as equivalent to "a weekly account of all the work done." That is the fair meaning of the words, and it would be contradicted by the parol evidence.

Blackett v. Royal Exchange Assurance Company, 2 Cr. & J. 244, is in point. There, in an action on a policy on ship, in the common form, "upon the body, tackle, apparel, ordnance, munition, boat, and other furniture of the ship called *The Thames*," it was held that parol evidence was inadmissible of a usage at Lloyd's that boats slung on the ship's quarter (which was proved to be the invariable mode of carrying them on such voyages as that insured) were not protected by the policy. In delivering the judgment of the Court Lord Lyndhurst, C. B., said, "The policy is in the usual form as to ship and goods, and, as far as regards the ship, imports to be upon the ship (that is, the body), tackle, apparel, ordnance, munition, boat, and other furniture of the ship called *The Thames*. There is no exception, and the policy is, therefore, upon the face of it, upon the *whole* ship, on *all* her furniture, and on *all* her apparel. It was in evidence in the cause, and admitted upon the argument, that, upon such voyages as that insured, ships invariably carry a boat in the place in which this boat was carried, and slung as this boat was slung; and that the ship would not be properly furnished or equipped, unless it had a boat in that place and so slung. The objection, then, to the parol evidence is, that it was not to explain any ambiguous words in the policy, any words which might admit of doubt, nor to introduce matter upon which the policy was silent, but *was at direct variance with [*313 the words of the policy, and in plain opposition to the language it used. That, whereas the policy imported to be upon the ship, furniture, and apparel generally, the usage is to say that it is not upon all the furniture and apparel, but upon part only, excluding the boat. Usage may be admissible to explain what is doubtful; it is never admissible to contradict what is plain." In the present contract "the work done" must mean "all the work done," just as, in that case, "boat" was held to include all the boats of the ship. In *Magee v. Atkinson*, 2 M. & W. 440, it was held that the defendant, who had signed a contract in his own name, could not be allowed to show that he had signed it only as a broker, although he was known to be so; and that parol evidence of a custom in Liverpool, where the contract was made, to send in brokers' notes without disclosing the principal's name, was properly rejected. [COCKBURN, C. J.—There are two cases referred to in *Park on Marine Insurance*, vol. 1, pp. 23, 24 (ed. 8). In one of these, *Ross v. Thwaite*, Sittings at Guildhall after Hil. T. 16 G. 3, Lord Mansfield, C. J., was of opinion that evidence of the usage of underwriters was admissible to show that goods lashed on deck are not within a general policy on goods; and that when such goods are intended to be insured they are always insured by name, and the premium is greater. In the other, *Backhouse v. Ripley*, C. P., Sittings after Mich. T., 1802, Chambre, J., ruled the same point.] Lord Lyndhurst, C. B., in the judgment in *Blackett v. Royal Exchange Assurance Company*, 2 Cr. & J. 244, 250, distinguishes those cases, and shows that they proceeded *upon a different principle, [*314 namely, that on an ordinary insurance on goods the underwriter is entitled to expect that they shall be stowed in the usual part of the ship; and that a usage that goods stowed in a more dangerous part are not covered by an ordinary policy, but require a distinct explanation to the underwriter of the nature of the risk, is not

(WIGHTMAN, J., was absent.)

HILL, J.—I am entirely of the same opinion. The question turns upon the meaning to be given, in the contract, to the words “a weekly account of the work done thereunder.” Mr. Lush says that the plain ordinary meaning of these words is a “weekly account of all the work done thereunder.” The usage of the trade is proved to be that they mean “a weekly account of the day work done thereunder.” We have to determine whether evidence of that usage was rightly received. Now the rule governing the admissibility of evidence to explain the language of contracts is, that words relating to the transactions of common life are to be taken in their plain, ordinary, and popular meaning; but if a contract be made with reference to a subject-matter as to which particular words and expressions have by usage acquired a peculiar meaning different from their plain ordinary sense, the parties to such a contract, if they use those words or expressions, must be taken to have used them in their restricted and peculiar signification. And parol evidence is admissible of the usage which affixes that meaning to them. The admissibility of such evidence does not depend upon whether the expression to be construed *319] is ambiguous or unambiguous; *but merely upon whether or not the expression has, with reference to the subject-matter of the contract, acquired the peculiar meaning.

BLACKBURN, J.—I am of the same opinion. I agree with my brother Hill that the words of a written commercial contract are to be understood in the sense which they have acquired in the trade to which the contract relates. It is a *prima facie* presumption that, if the parties to such a contract use expressions which bear a peculiar meaning in the trade, they use them in that peculiar meaning; which can be ascertained only by parol evidence. I do not think that it is necessary, in order to render such evidence admissible, that there should be any ambiguity on the face of the phrase which has to be construed. In *Humphrey v. Dale*, 7 E. & B. 266, 274 (E. C. L. R. vol. 90), where the question arose as to the admissibility of parol evidence to annex to a contract a customary incident, Lord Campbell, C. J., said, “Whether this evidence be treated as explaining the language used, or adding a tacitly implied incident to the contract beyond those which are expressed, is not material. In either point of view, it will be admissible unless it labours under the objection of introducing something repugnant to or inconsistent with the tenor of the written instrument. And, upon consideration of the sense in which that objection must be understood with reference to this question, we think it does not. In a certain sense every material incident which is added to a written contract varies it, makes it different from what it appeared to be, and so far is inconsistent with it.” The rule is still more correctly laid down in *Smith’s Leading Cases*, vol. 1, p. 529 (ed. 5), in the *320] notes to *Wigglesworth v. Dallison*; where, after setting out Parke B.’s judgment in *Hutton v. Warren*, 1 M. & W. 466, 474, the author thus proceeds:—“From the above luminous judgment” “it may be collected that evidence of custom or usage will be received to annex incidents to written contracts on matters with respect to which they are silent.” “But that such evidence is only receivable when the incident which it is sought to import into the contract is con-

sistent with the terms of the written instrument. If inconsistent, the evidence is not receivable, and this inconsistency may be evinced, 1st, by the express terms of the written instrument. 2d, by implication therefrom." That I take to be the true rule of law upon the subject; that when it is shown that a term or phrase in a written contract bears a peculiar meaning in the trade or business to which the contract relates, that meaning is, *prima facie*, to be attributed to it, unless, upon the construction of the whole contract, enough appears, either from express words or by necessary implication, to show that the parties did not intend that meaning to prevail. The consequence is that every individual case must be decided on its own grounds, and upon the terms of the particular contract in dispute, regarded as a whole. In the cases of *Blackett v. Royal Exchange Assurance Company*, 2 Cr. & J. 244, and *Spartali v. Benecke*, 10 C. B. 212 (E. C. L. R. vol. 70), it will be found, I think, that the parol evidence was rejected on the ground that the language of the contract in each case, taken as a whole, evinced on the face of it an intention of the parties not to use the words in dispute in the restricted sense to which it was sought by the evidence to confine them. Neither of those cases *conflicts [*821 with the general principle, which has been always admitted. In the present case, nothing appears on the face of the contract to lead to the conclusion that the parties did not intend to use the term "weekly account" in the peculiar sense which it bore in the building trade. On the contrary, the great probability is that both the plaintiff, as a builder, and the defendants' architect, intended to use it in that sense. Consequently, I think that the arbitrator was quite right in admitting the evidence.

Judgment for plaintiff on first point, and for defendants on the second.

CRAMPTON v. WALKER. Nov. 20.

Declaration that, in consideration that plaintiff would accept, for defendant's accommodation, a bill of exchange drawn by defendant on plaintiff, and would deliver the same to defendant in order that he might negotiate it for his own use, defendant promised plaintiff to indemnify and save him harmless from any consequent loss or damage. Averment, that plaintiff accepted the bill and delivered it to defendant. Breach, that defendant did not indemnify or save harmless plaintiff from loss or damage; and plaintiff, as acceptor, was obliged to and did pay W., the holder, the amount of the bill and interest, and the costs of an action on the bill by W. against plaintiff, as acceptor; and plaintiff also incurred costs and expenses in defending and settling such action.

Pleas. 1. To so much of the declaration as relates to plaintiff's claim in respect of his payment to W. of the amount of the bill and interest; A set-off.

Demurrer. Joinder in demurrer.

2. To so much of plaintiff's claim as relates to the costs of the action brought by W. against plaintiff, and the costs and expenses incurred by plaintiff in defending and settling the said action; That the whole of the said costs and expenses were incurred by plaintiff at defendant's request: concluding with a set-off.

Replication thereto, That the said costs and expenses were not, nor was any part thereof, incurred at defendant's request as alleged.

Demurrer. Joinder in demurrer.

Held, that the first plea was good, for that plaintiff's claim in respect of the amount of the bill and interest was a liquidated demand, capable of being ascertained with precision at the time of pleading; and was separable from the rest of the claim, though mixed up with it in one count. That the second plea was bad, being pleaded to costs and expenses

incurred by plaintiff, but not paid, and therefore not constituting a liquidated demand to which a set-off could be pleaded.

DECLARATION. For that, in consideration that plaintiff would *322] accept, for defendant's *accommodation, a bill of exchange drawn by defendant on plaintiff, requiring him to pay to defendant's order the sum of 100*l.*, three months after date, and would deliver the same to defendant, in order that he might negotiate the same for his own use, defendant promised plaintiff to indemnify and save harmless plaintiff from any loss or damage by reason thereof. Averment, that plaintiff accepted the said bill for defendant's accommodation, and delivered the same to him for the purpose and on the terms aforesaid. Breach, that defendant did not indemnify or save harmless plaintiff from loss or damage by reason thereof; and plaintiff, as acceptor of the said bill, was obliged to and did pay to one Lucas Waring, the holder thereof, the amount of the said bill, with interest thereon, and the costs of an action brought by the said Lucas Waring against plaintiff as such acceptor; and plaintiff also incurred costs and expenses in defending and settling the said action.

Pleas. 1. To so much of the declaration as relates to plaintiff's claim in respect of his payment to the said Lucas Waring of the amount of the said bill and the interest thereon; A set-off for money paid by defendant to the use of plaintiff at his request, and for money lent by defendant to plaintiff at his request, and for money had and received by plaintiff for defendant, and for money otherwise due from plaintiff to defendant.

Demurrer. Joinder in demurrer.

2. To so much of plaintiff's claim as relates to the costs of the action brought by the said Lucas Waring against plaintiff, and the costs and expenses incurred by plaintiff in defending and settling the said action: That the whole of the said costs and expenses were incurred by plaintiff *323] at the request of defendant; and that at the *time of the commencement of this suit plaintiff was and still is indebted to defendant in an amount equal to plaintiff's claim, in respect of a set-off similar to that pleaded in the first plea.

Replication thereto. That the said costs and expenses were not, nor was any part thereof, incurred at the request of defendant as alleged.
• **Demurrer. Joinder in demurrer.**

Welsby, for the plaintiff.—First: the first plea is bad. The action being for unliquidated damages, a plea of set-off is inadmissible. Such a plea, pleaded to a declaration very similar to that in the present case, was held bad in *Hardcastle v. Netherwood*, 5 B. & Ald. 93 (E. C. L. R. vol. 7). It is true that the plea, there, was pleaded to the whole declaration, and that the Court said, "The defendant might, perhaps, have pleaded a set-off to that part of the count which charges the defendant with the amount of the acceptances paid by the plaintiff." There is, however, no distinction in principle between a plea to the whole and a plea to part of a declaration sounding in damages, and in which the breach is general. [HILL, J.—The part of the declaration to which the first plea is pleaded is in substance a special count for money paid. COCKBURN, C. J.—The part of the demand answered by the plea is a sum certain, or, at any rate, capable of being ascertained at the time of pleading. The rule; therefore, laid down in

Welsby's Chitty's Statutes, vol. 3, p. 1026, note, (b) (2d ed.), that "There cannot be a set-off against a claim merely sounding in damages, and which is not capable of being liquidated at the time of pleading," does not apply. *HILL, J.—That statement of the rule is fully borne out by the judgment of Tindal, C. J., in [*324 *Morley v. Inglis*, 4 B. N. C. 58, 70 (E. C. L. R. vol. 33), one of the authorities cited in support of it.] The question is, whether the Statute of Set-off empowers a defendant to sever a claim which sounds in damages. [HILL, J.—Suppose that the defendant had paid this part of the plaintiff's claim before action; could he not have pleaded payment?] Probably not; the breach assigned in the declaration being, in effect, that the defendant failed to indemnify the plaintiff from the loss or damage incurred by the negotiation of the bill. But, assuming that payment might have been pleaded, it does not necessarily follow that a plea of set-off is admissible. Secondly: The replication to the second plea is good. That plea, however, is bad, as being pleaded to the unascertained costs of the action brought by Waring, including, possibly, costs incurred but not yet paid by the plaintiff. *Hardcastle v. Netherwood*, 5 B. & Ald. 93 (E. C. L. R. vol. 7), and *Auber v. Lewis*, E. T. 1818, K. B., Manning's Nisi Prius Digest, 2d ed. p. 251, there cited, are authorities against this plea also. [HILL, J.—*Garrard v. Cottrell*, 10 Q. B. 679 (E. C. L. R. vol. 59), shows that if the defendant requested the plaintiff to undertake the defence of Waring's action, the costs of it would be recoverable as money paid to the defendant's use. If so, they might also form the subject of a set-off.] Possibly they might, if the declaration was on the common counts; but here the count is special, and sounds in damages. Assuming, however, that the plea is good, the replication is also good. The request mentioned in the plea must mean an express request, the traverse of which by the replication is no departure from the [*325 *declaration, which proceeds upon the principle that an accommodation acceptor is entitled to recover from the party accommodated the necessary costs of defending an action on the bill, as damages for the breach of indemnity, apart from any request from the defendant: *Jones v. Brooke*, 4 Taunt. 464, *Stratton v. Mathews*, 3 Exch. 43.

Garth, contra.—The first plea is good. There is a substantial distinction between an action for the breach of a contract to indemnify and other actions sounding in damages only; inasmuch as the damage arising from the failure to indemnify is the cause of action. The fact that damage has arisen from the breach is essential to the maintenance of the action; a plea, therefore, to the damages stated in the declaration to have arisen is a good plea, just as non damnificatus would be. The damages may also be pleaded to separately; otherwise the defendant would have no defence if he had before action satisfied the plaintiff part, or been released as to part of them. The amount of the bill and interest, to which the first plea is limited, might have been recovered by the plaintiff in an action for money paid for the defendant. A plea of payment of so much would have been a good answer to the plaintiff's claim for so much, in the declaration as actually framed; it follows that the plea of set-off is equally valid. The defendant is not to be prejudiced in his defence to that which is a mere money demand because the plaintiff has inserted it in a special count.

The dictum of the Court in *Hardcastle v. Netherwood*, 5 B. & Ald. 98 (E. C. L. R. vol. 7), is strongly in favour of the validity of the first plea. The judgment of Tindal, C. J., in **Morley v. Inglis*, 4 B. N. C. 58 (E. C. L. R. vol. 38), shows that the test whether or not a set-off can be pleaded is whether or not the amount pleaded to or sought to be set off is capable of being liquidated or ascertained with precision at the time of pleading. *Hamilton v. Gould*, 1 Irish Law Rep. 171, is a direct authority in the defendant's favour, as to the first plea. The plaintiff in that case, as in this, sued as accommodation acceptor of a bill of exchange drawn by the defendant on him. The declaration contained a special count for not indemnifying the plaintiff from any loss or damage by reason of the acceptance; and averred that, in consequence of the defendant's neglect to pay the bill at maturity, the plaintiff was forced and obliged to pay the holder the amount, whereby the plaintiff was damnified to that amount, together with interest. The declaration also contained the usual money counts. The plaintiff's bill of particulars claimed only the amount of the bill and interest. The defendant pleaded the general issue, and gave notice of a set-off. At the trial, the plaintiff relied on the special count only, and the defendant's counsel, admitting his liability under that count, gave evidence of a set-off. The question whether a set-off was admissible was reserved, and the case was twice argued. It was held that the defendant's set-off should be allowed, as the plaintiff might have recovered under the money counts, and could not deprive the defendant of his set-off by declaring specially. In delivering the judgment of the Court, Bushe, C. J., said, "The first point reserved is, that this is not a case of mutual debts between the parties, the plaintiff's demand being for unliquidated damages. The question is, whether the plaintiff's claim be of such a nature; for, *if so, the set-off cannot *327] be sustained. The plaintiff, by his declaration, and also by his bill of particulars, only seeks to recover the amount of the bill of exchange and interest. This he might have recovered under the count for money paid for the defendant. *Seaver v. Seaver*, 6 C. & P. 673 (E. C. L. R. vol. 25). The plaintiff cannot be permitted, by introducing a special count, to defeat the defendant's right to set-off, *Birch v. Depeyster*, 4 Campb. 385; and here, the defendant's notice of set-off is to the whole declaration. The case of *Hardcastle v. Netherwood*, 5 B. & Ald. 98 (E. C. L. R. vol. 7), was relied upon by the plaintiff; but in that case, there was only a special count, and the plaintiff claimed charges and costs, which were unliquidated damages, and not a debt; and the Court intimated an opinion, that the defendant might have pleaded a set-off to so much of the count as charged him with the amount of the bill of exchange paid by the plaintiff. The case of *Hutchinson v. Reid*, 3 Camp. 329, is an authority that the defendant might have pleaded a set-off, if the action had not been brought before the two months expired for which the bill on which he relied as a set-off was drawn. We are of opinion that the set-off in this case must be allowed, because the plaintiff might have recovered under the money counts, and he cannot deprive the defendant of his set-off by pleading specially." Lastly, the second plea is good. *Garrard v. Cottrell*, 10 Q. B. 679 (E. C. L. R. vol. 59), shows that the costs of the action brought by Waring against the plaintiff would be recoverable

by the plaintiff as money paid to the defendant's use, if that action was defended at the request, express or implied, of the defendant. It follows that a set-off can be pleaded to the plaintiff's claim in respect of those costs. **[HILL, J.—The plea is pleaded to the costs incurred; not to the costs paid.]* It may be amended, if necessary, by confining it to the costs paid. *[HILL, J.—You cannot get over Jones v. Brooke, 4 Taunt. 464, and Stratton v. Mathews, 8 Exch. 48.]*

Welsby, in reply.—The cause of action is substantially the breach of the promise to indemnify, and arises immediately upon the non-payment of the bill at maturity, by the defendant. The consequences ensuing thereupon are mere damages, and the first plea is bad, as being pleaded to the damages.

COCKBURN, C. J.—I am of opinion that the first plea is good, and the defendant is entitled to judgment on the demurrer to that plea. If Mr. Welsby's argument was well founded, that, on the mere non-payment of the bill at maturity by the person for whose accommodation it was accepted, the cause of action at once arises for the breach of the contract to indemnify, and that all the consequences ensuing are merely damages flowing from that breach, no doubt it would follow that the damages claimed in the declaration could not be treated as separable, so as to admit of a plea of set-off to part of them. I think, however, that Mr. Garth's contention was sound and correct, that the cause of action arises only when loss or damage is sustained by the plaintiff, and that every fresh loss or damage is a fresh cause of action. If that be so, the defendant cannot be deprived of his right to plead a set-off to any part of the plaintiff's claim to which, if it stood alone, such a plea would be admissible, merely because the plaintiff has chosen to lump several claims together in one count. Suppose *that the plaintiff had had two causes of action arising out of the same subject-matter, and that as to one of them the defendant had offered the plaintiff a sum of money in satisfaction, which the plaintiff had accepted and had given a release; ought not the defendant to have been allowed to plead the release, however the plaintiff had mixed up the causes of action in the declaration? Or again, supposing that a plaintiff having two causes of action has entered into an accord and satisfaction with the defendant as to one, and that the defendant altogether denies his liability as to the other; ought not the defendant, in such a case, to be allowed to sever his pleas, pleading the accord and satisfaction as to the one cause of action, and traversing the other? I at first thought that *Hardcastle v. Netherwood*, 5 B. & Ald. 98 (E. C. L. R. vol. 97), was an authority against the defendant, and that it was a decision which had proceeded on more narrow and technical grounds than now prevail. But I find that it was based upon the very distinction which we are now taking. The plea of set-off was there pleaded to the whole of a declaration which contained but one count, founded partly on liquidated and partly on unliquidated demands; and was held bad on that account. But the Court expressed an opinion that the plea would have been admissible if confined to the liquidated demands. That distinction appears to me to be sound. Once it is seen that a declaration contains, mixed up in the same count, distinct causes of

action, some for liquidated claims, others sounding only in damages; the defendant must be entitled to separate them and plead accordingly. As to the second plea, the objection pointed out by my Brother Ill *330] is quite unanswerable. The plea is one *of set-off to the costs of the action on the bill against him, incurred but not paid by the plaintiff. But it is quite clear that, assuming that the costs actually paid can be regarded as a liquidated demand, those merely incurred but not paid cannot be so considered.

(WIGHTMAN, J., was absent.)

HILL, J.—I am of the same opinion. The main question arises upon the first plea, the second being virtually abandoned. And the question is, whether the cause of action to which the first plea is pleaded constitutes a debt due from the defendant to the plaintiff, so as to admit of being answered by a plea of set-off, under the Statute of Set-off which allows the debt of one party to be set off against that of the other, where there are mutual debts between them. Upon this subject Tindal, C. J., in his judgment in *Morley v. Inglis*, 4 B. N. C. 58, 71, 72 (E. C. L. R. vol. 38), says, after citing the language of the Statute of Set-off, "I shall not undertake to say that the word *debt* is to be interpreted according to the strict sense which is necessary to the maintaining an action of debt, nor shall I go through the beadroll of authorities which have been referred to on that point. It seems to me that the rule by which we are to determine whether or not a demand can become the subject of a set-off, is by inquiring whether it sounds in damages; whether the demand is capable of being liquidated, or ascertained with precision at the time of pleading." And, a little further on, he suggests as a test for considering whether a plea of set-off is admissible to an action on an agreement, whether the agreement is such that *indebitatus assumpsit* would lie *331] upon it. In the present case the plaintiff, as accommodation acceptor, is suing the defendant, the accommodation drawer, on the usual implied undertaking to indemnify the plaintiff, who has been compelled to pay the bill to the holder; and the plaintiff says, in effect, I claim from you the amount which I have been compelled to pay in consequence of your implied request. Could he have maintained *indebitatus assumpsit* for money paid? Undoubtedly he could: so that his claim falls within the test suggested by Tindal, C. J. It is, however, said on his behalf that, because this his claim forms part only of but one cause of action contained in one and the same count of the declaration, the defendant cannot sever it and plead to it separately. But in *Hardcastle v. Netherwood*, 3 B. & Ald. 93 (E. C. L. R. vol. 5), the Judges, who felt compelled to disallow a plea of set-off pleaded to the whole of a count similar to the present, distinctly threw out that the plea might have been supported had it been confined to the liquidated part of the demand. That expression of opinion would alone be sufficient to dispose of the plaintiff's objection to the present plea: but, in addition to it, there is the case of *Hamilton v. Gould*, 1 Irish Law Rep. 171, the decision in which is directly applicable in the defendant's favour. Mr. Welsby contends that the plaintiff can avoid a plea of set-off by declaring on the special count. The Irish Judges, however, advert to that point, and refer to *Birch v. Depeyster*, 4 Campb. 385, in which Gibbs, C. J., said, "I am of opinion that the

defendant is entitled to the set-off which he claims. The sums which the plaintiffs seek to recover might have been recovered as money had and received to their use. Therefore they shall *not deprive the defendant of his set-off by declaring specially, and [*332 assigning a breach for not accounting." And it is certainly consonant with justice that a plaintiff should not be allowed, by declaring in a special form, to oust the defendant from a good and legitimate ground of defence.

Judgment for the defendant on the demurrer to the first plea: for plaintiff on the demurrer to the replication to the second plea.

Whether unliquidated damages are available as a subject of set-off, is a point upon which the practice of the different states is by no means uniform, and where such damages may be set-off the extent of the privilege depends upon the language of the statute which establishes the right. The Defalcation Act of Pennsylvania passed in the year 1705, during the reign of Queen Anne, grants the privilege as unrepealed as the statute of any sister state has subsequently extended it. The language of that act is in the following comprehensive terms: "If two or more dealing together be indebted to each other upon bonds, bills, bargains, promises, accounts, or the like, and one of them commence an action in any court of this province, if the defendant cannot gainsay the deed, bargain, or assumption upon which he is sued, it shall be lawful for such defendant to plead payment of all or part of the debt or sum demanded, and give any bond, bill, receipt, account, or bargain in evidence," in payment or satisfaction. If the damages spring from the identical transaction out of which the controversy arises, as where they result from the breach of the contract on which suit is brought, they constitute a deduction rather than an offset, and reduce the amount sought to be recovered: *Avery v. Brown*, 81 Conn. (1863) 398. And the rule that in actions for services rendered or goods sold, unskilful or negligent per-

formance, or inferior quality, was not ground for a set-off against the price agreed to be given, has been reversed, and defendant may now set off, in an action for the price, the damages which he has suffered by reason of plaintiff's breach of his warranty. Thus, where plaintiff warranted an aqueduct, which he constructed for defendant, to be serviceable for at least one year, the damages which defendant suffered in consequence of the failure of the aqueduct, were allowed to be set off in the action for the work and labour performed, under the general issue without a plea in offset. The Supreme Court of Vermont thus states the principle: "Such a warranty, although of a collateral matter in some respects, and not necessarily connected with the sufficiency of the erection made by plaintiff, would, nevertheless, form an essential ingredient in the price of the work, or in its value to the defendant, and if it failed, would be to that extent a failure of the consideration of the defendant's undertaking, and for this reason may be taken advantage of in an action for the price, the same as if the warranty had reference to the quality of plaintiff's work, which seems not to have been excluded from the consideration of the jury, and the other view of the warranty should not have been. It was upon this ground that all warranties of goods and labour were rested in suits for such labour and goods, formerly, it being considered

ness in the work and the like, and so might the rent, if the landlord had been suing for it on account of interference with the tenant's possession, not amounting to eviction, but acts against quiet enjoyment. These would be instances of the claims arising in the same transaction being allowed to be given in evidence to extinguish the claim by a liberal construction of our Defalcation Act: *Steigleman v. Jeffries*, 1 S. & R. 477, passed upon this principle. There the defendant set off damages for a breach of warranty of goods, in a suit to recover the price. So in *Harper v. Kean*, 11 S. & R. 280, the plaintiff sold leather for the defendant for less than what it was worth in the market, and the latter was allowed a defence to the judgment to which the proceeds were to be applied to the extent of what it should have brought. *Badger v. Shaw*, 12 S. & R. 275, was a suit for the price of cattle sold, and the defendant was allowed to defalc damages for the non-delivery of sheep sold to him by the plaintiff; *Duncan, J.*, saying, 'where the cause of action which the defendant wishes to set off, arises from the same transaction as that in which the plaintiff founds his action, he may have both decided by the same jury.' *Hubler v. Tamney*, 5 Watts 57, is of the same nature. In these cases connection between the claim and the defence is so apparent that the justice of the principle must be admitted, although the matter defalked was not strictly a set off. Not so the case in hand. It was impossible to settle the entire covenants in one action. They were of different and distinct natures,

and to be performed at different and distinct periods." The Supreme Court of Vermont took the same view in *Keyes v. Western Vt. Slate Co.*, *supra*, though the point was not necessary for the decision of that case: 5 Shaw 81-4.

The statutory provision in Vermont confers the right of set-off only when the plaintiff is indebted to the defendant on a contract express or implied. The courts of that state, taking exactly the opposite view from the opinion in the principal case, decide that indebtedness is not confined to a liquidated demand, but also includes a claim which is unliquidated: *Hubbard v. Fisher*, 25 Vt. (1853) 539. *Redfield, C. J.*, said: "An offset, in this state, is not required to be liquidated, in order to be pleaded in set-off, as is the rule at common law; but here the plea is a mere declaration, and may cover any matter of contract." Though the language of the code in Ohio is as comprehensive as the Statute of Offsets in Vermont, the courts have not given it the same interpretation, but have confined it to liquidated damages: *Evens v. Hall*, 1 Handy (1855) 434; *McCullough v. Lewis*, 1 Disney (1857) 564. In Maine the demand must be liquidated: *R. S.*, c. 82, p. 47; *Cutler v. Gilbreth*, 2 Virgin (Me. 1865) 176: *Kentucky*; *Shropshire v. Conrad*, 3 Met. (1859) 143; *Taylor v. Stowell*, 4 Id. (1862) 175: *Massachusetts*; *Cardell v. Bridge*, 9 Allen (1864) 355: *New York*; *Prouty's Ex'rs v. M'Dowgall*, 6 Cowen (1827) 612; *Secor v. Law*, 9 Bosw. (1862) 188: *Rhode Island*; *Rev. Stats. ch. 185, sect. 12.*

THOMPSON and others *v.* The NORTH EASTERN Railway Company. *Nov.* 22.

[Reported, in the Queen's Bench and in the Exchequer Chamber on error from that Court, 2 B. & S. 106 (E. C. L. R. vol. 110).]

The QUEEN *v.* HOWES. *Nov.* 23.

As a general rule, the father of a female child under the age of sixteen is legally entitled to her custody; and she is not of an age to exercise a discretion to withdraw herself therefrom. Persons detaining such a child from her father's protection, though with her consent, will therefore be ordered by this Court, on proceedings by habeas corpus, to give her up to her father.

A HABEAS corpus had issued, commanding the defendant to bring up the body of Charlotte Barford, a girl under the age of sixteen.

The defendant now brought the girl into Court, in obedience to the writ.

**Sligh* moved that she should be delivered up to her father, [*833 at whose instance the habeas corpus had issued.^(a)

The father is the proper person to have the custody of his child; who is not of an age of discretion sufficient to entitle her to exercise a choice, and absent herself from his protection. At the time when stat. 12 Car. 2, c. 24, was passed, parents were entitled to the custody of their children up to the age of twenty-one: and that Act, by sect. 8, empowered the father of any unmarried child under that age to dispose, by deed or will, of its custody while under that age. Stat. 4 & 5 P. & M. c. 8, s. 3, made it an offence, punishable by fine or imprisonment, to take any maid or woman child unmarried, being within the age of sixteen years, out of or from the possession and against the will of the father or mother of such child; and stat. 9 G. 4, c. 31, which repeals that Act, by sect. 20 re-enacts the offence. It was held by the Court for Crown Cases Reserved, in *Regina v. Manktelow*, 1 Dears. C. C. R. 157, that a man is guilty of the misdemeanour created by this section, who induces a girl, under the age of sixteen, to go away with him voluntarily, and leave her father's protection. [HILL, J.—That case shows that the law does not consider that a girl under that age has any discretion to exercise a choice.] That is so. And the legal custody of a legitimate child, too young to exercise a discretion, is that of the father: *Rex v. Greenhill*, 4 A. & E. 624 (E. C. L. R. vol. 31). *Regina v. Clarke*, 7 E. & B. 187 (E. C. L. R. vol. 90), shows that the guardianship for nurture of a child continues till the *child attains the age of fourteen, up to which time the guardian for nurture is absolutely entitled to the custody of the [*834 child. In the present case, although the child is between fifteen and sixteen, she is, according to the authorities, still too young to exercise a discretion to leave her father.

Digby Seymour, contra.—The Court will not order this girl to be given up to her father if it appears that she is unwilling to return to

(a) Before hearing the argument, the Judges had an interview with the girl in their private room.

him. Stat. 12 Car. 2, c. 24, s. 8, applies only in a case where a father has executed a deed or will relating to the custody of his infant child; and stat. 9 G. 4, c. 81, s. 20, is directed against unlawful abductions only. As a general rule, the right of a father to the custody of his child ceases when the child attains the age of fourteen. In Bac. Abr. tit. *Guardian* (E), it is laid down that "The authority of a guardian in socage ceases at the age of fourteen, at which age the infant may call his guardian to an account, and may choose a new guardian." [COCKBURN, C. J.—That may be so, with reference to guardianship in socage, which is of an artificial character: but can it apply to the patria potestas? BLACKBURN, J.—In a note to Ratcliff's Case, 3 Rep. 38 a. b. Note (F) at vol. 2, p. 105, of Thomas and Fraser's edition, it is said: "The direct object of stat. 4 & 5 P. & M. was to prevent the taking away or marrying maidens under sixteen, against the consent of their parents; but the statute prohibited it in terms which implied, that the custody and education of such females should belong to the father and mother, or the person appointed by the former."] The judgment of the Court in *Regina v. Clarke*, 7 E. & B. *335] 196, 197 (E. C. L. R. vol. 90), delivered by Lord Campbell, C. J., appears to fix fourteen as the age at which a child reaches years of discretion. He says: "It is unnecessary to travel through the cases seriatim, as they are all reviewed in *Rex v. Greenhill*, 4 A. & E. 624 (E. C. L. R. vol. 10), where the Court laid down the rule that, where a young person under twenty-one years of age is brought before the Court by habeas corpus, if he be of an age to exercise a choice, the Court leaves the infant to elect where he will go, but, if he be not of that age, the Court must make an order for his being placed in the proper custody. Lord Denman, Littledale, J., Williams, J., and Coleridge, J., all make age the criterion, and not mental capacity, to be ascertained by examination. They certainly do not expressly specify the age: but they cannot refer to seven as the criterion; and there is no intervening age marking the rights or responsibility of an infant till fourteen, when guardianship for nurture ceases, upon the supposition that the infant has now reached the years of discretion." [COCKBURN, C. J.—Further on in that judgment, at p. 199, a letter of Patteson, J., to Sir Erskine Perry, when Chief Justice of Bombay, is cited, in which, referring to an order of Sir Erskine Perry's Court for the delivery up of a Hindoo boy of twelve years of age, who professed to have embraced Christianity, to his father who adhered to the Hindoo religion, the writer says, "I cannot doubt that you were quite right in holding that the father was entitled to the custody of his child, and enforcing it by writ of habeas corpus. The general law is clearly so, and even after the age of fourteen." It is not the age of nurture, but the age of discretion which limits the paternal authority. *336] *Regina v. Manktelow*, 1 Dears. C. C. R. 157, shows that, were we to decide that this girl may follow her own inclinations and refuse to go back to her father, the defendant might nevertheless be convicted for her unlawful abduction. But his conviction would rest on the ground that she is not of age to give consent to her removal from her father's protection.]

COCKBURN, C. J.—Those who resist this application for the interference of the Court in order to the delivery up of this girl to her

father, have made out no case whatever to show that he, though by law entitled to her custody, is not so entitled upon the facts. The question before us is purely one of law, whether a father is entitled to the custody of a child between the age of fifteen and sixteen, notwithstanding that the child desires not to be in his custody; as I fear that the girl before us, without any adequate or justifying motive, does. If we can save her from the mischiefs to which such a course on her part, if uncontrolled, would very probably lead her, we shall be most anxious to do so. Now the cases which have been decided on this subject show that, although a father is entitled to the custody of his children till they attain the age of twenty-one, this Court will not grant a habeas corpus to hand a child which is below that age over to its father, provided that it has attained an age of sufficient discretion to enable it to exercise a wise choice for its own interests. The whole question is, what is that age of discretion? We repudiate utterly, as most dangerous, the notion that any intellectual precocity in an individual female child can *hasten the period which [*337 appears to have been fixed by statute for the arrival of the age of discretion; for that very precocity, if uncontrolled, might very probably lead to her irreparable injury. The Legislature has given us a guide, which we may safely follow, in pointing out sixteen as the age up to which the father's right to the custody of his female child is to continue; and short of which such a child has no discretion to consent to leaving him. And it is clearly most desirable that, at least up to that age, no encouragement should be given to girls to withdraw themselves from the paternal care. I may add that if those persons, who have tried their best to baffle the authority of this Court, and to keep this girl back from her father, had been indicted for the offence of abducting her, it appears to me that they would have been liable to conviction. I wish to say, also, that we have not arrived at our conclusion without great consideration, and that we have consulted with the Judges of the other Courts, who are entirely of the same opinion with us. We must order that the girl be given up to her father.

(WIGHTMAN, J., was absent.)

HILL and BLACKBURN, Js., concurred.

Ordered accordingly.

*In the matter of WILLIAM HENRY CRAVEN ALLEN. [*338
Nov. 23, 24.

By the 131st of the Articles of War drawn up in pursuance of The Mutiny Act for 1857, 20 Vict. c. 13, s. 1, jurisdiction was conferred on general Courts-martial in India to try and sentence certain military offenders accused there of civil offences. By sect. 38 of that Act, the place of imprisonment under the sentences of general Courts-martial is to be appointed by the officer commanding the district. By sect. 40, every governor or keeper of any public prison in any part of Her Majesty's dominions is required to receive into and keep in his custody any military offender under sentence of imprisonment by a Court-martial, upon delivery to him of an order in writing in that behalf from the officer commanding the regiment to which the offender belongs, containing certain specified particulars. By sect. 41, in the case of a prisoner undergoing imprisonment under the sentence of a Court-martial in any public prison other than the military prisons set apart by the authority of the Act, the officer commanding the district is empowered to give an order in writing, directing that the prisoner be delivered over to military custody, for the purpose of

being removed to some other prison or place, there to undergo the remainder of his sentence.

A., a military offender amenable to the jurisdiction, was tried in India, under the above statute, by a general Court-martial, for a civil offence, of which the Court found him guilty, and for which they sentenced him to four years' imprisonment. The officer commanding the district in which he was tried appointed the Fort of Agra as the place of his imprisonment. It did not appear whether this fort was or was not a public prison, or was or was not a military prison set apart by the authority of the Act. It was, however, under military command. A. was imprisoned there for about nine months; at the end of which the same officer who had appointed it as the place of imprisonment gave an order in writing, directing that he should be removed therefrom to England, to undergo there the remainder of his sentence; but not mentioning any prison in England to which he was to be removed. A., having been brought to England under this order, was there confined in several prisons in succession, and, ultimately, in the Queen's Prison; an order from the Commander-in-Chief of the army in England, directing the keeper of that prison to receive him into custody for the remainder of his sentence, being sent there with him.

Held, making absolute a rule for a habeas corpus obtained by A., that A. was entitled to his discharge: for that his detention in custody, which could not be justified at common law, was not warranted by the Act in question; inasmuch as, assuming (a point which the Court did not determine) that the case fell within the provisions of the Act as to the removal of prisoners, no valid order for his detention in the Queen's Prison had been made under either sect. 40 or sect. 41.

SHEE, Serjt., in this term, had obtained a rule, on behalf of William Henry Craven Allen, calling on His Royal Highness the Duke of Cambridge, the General Commanding in Chief, and the keeper of the Queen's Prison, to show cause why a writ of habeas corpus ad subjiciendum should not issue, directed to the keeper of the Queen's Prison, to bring up the body of the said W. H. C. Allen, then in the custody of the said keeper.

*[339] It appeared, from the affidavits on which the rule was obtained, that the prisoner was a lieutenant of Her Majesty's 82d Regiment of Foot, and had been, on 28th February, 1859, tried at a general Court-martial held at Shalychanpore, in the East Indies, and upwards of 120 miles from the Presidency of Fort William, on a charge of the murder of one Bidassee. The Court found him guilty of manslaughter only, and he was sentenced to be imprisoned for four years, without hard labour. The sentence of the Court-martial was confirmed by Lord Clyde, who was the officer commanding the district. He appointed Agra Fort (in the East Indies) as the place of imprisonment. In obedience to the sentence and to the appointment of Lord Clyde, Lieut. Allen was imprisoned at Agra until 26th November, 1859, upon which day he was removed to Calcutta, with an intimation that he was to be sent to England. He was confined in Fort William from 23d December, 1859, until 30th January, 1860, when he embarked for England. He arrived in England on 20th June, 1860, and was confined for a few days at Chatham; from which place he was taken, on 26th June, to the convict prison at Millbank. On 16th July he was taken to the military prison at Weedon. On 24th July he was taken from Weedon to Newgate, where he was kept till 28th July, on which day he was taken to the Queen's Prison. The following letter from the Adjutant-General was sent with him.

"Immediate.

"Horse Guards, S. W., July 28, 1860.

"Sir,

"His Royal Highness the General Commanding in Chief desires me

to inform you that he intends *delivering into your custody Lieut. W. H. C. Allen, late of the 82d Foot, and I have the [*340 honour herewith to enclose his committal.

(Signed) "J. YORKE SCARLETT, A. G."

"The Governor of the Queen's Prison."

Enclosed was the following.

"Memorandum for the Governor of the Queen's Prison."

"You are hereby requested to receive into your custody, and to keep in confinement until the expiration of his imprisonment, Lieut. W. H. C. Allen, late of the 82d Regiment of Foot; pursuant to a sentence of a general Court-martial held at Shalychanpore, in the East Indies. The date of signing the same was 28th February, 1859, and the date of the expiration of his imprisonment will be on the evening of 27th February, 1863."

[A statement of the charge and of the sentence here followed.]

"By order of His Royal Highness the General Commanding in Chief. J. YORKE SCARLETT, A. G."

It was agreed by both sides that, with the permission of the Court, the decision upon the argument of the rule should be final; and that a writ and return should be dispensed with.

Sir W. *Atherton*, Solicitor-General, and *Welsby* now showed cause. (a) —The question for the decision of the Court is, whether Lieut. Allen is now in lawful custody. By stat. 20 Vict. c. 13, s. 1, The Mutiny Act which was in force in India at the time of Lieut. Allen's trial *(a provision embodied in the subsequent Mutiny Acts), [*341 power is given to Her Majesty "to make Articles of War for the better government of Her Majesty's forces, which articles shall be judicially taken notice of by all Judges and in all Courts whatsoever." The 131st of the Articles of War, drawn up pursuant to this enactment, provided that "Any officer or soldier who" might "be serving in India, at a distance of upwards of 120 English miles from any of the Presidencies of Fort William, Fort St. George and Bombay," "or in the territories of any foreign State, or in any country under the government and protection of us, where there is no Court of civil jurisdiction in force, by our appointment, competent to try such offenders, who shall be accused of treason, or of any other civil offence, which, if committed in England, would be punishable by a Court of ordinary criminal jurisdiction and not by a Court-martial, shall be tried by a general Court-martial, appointed by the General or other officer having power to appoint Courts martial in such places as aforesaid for the time being, and if found guilty shall be liable, in the case of an offence which, if committed in England, would be capital, to suffer death, or such other punishment as by the sentence of such general Court-martial shall be awarded; and in the case of any other offence to suffer such punishment other than death as by the sentence of such general Court-martial shall be awarded; no such punishment, nevertheless, to be of such a nature as shall be contrary to the usages of English law in regard to the punishment of offenders, or of that law as modified by laws applicable to India, or to be carried into effect until confirmed by the General or other officer by whom, or

(a) Friday, November 23d.

under whose authority, such Court-martial was appointed." The
 *842] *general Court-martial which tried Lieut. Allen had, therefore, jurisdiction to try and convict him for the civil offence of which he was found guilty. He is now undergoing his sentence in a fitting prison in Her Majesty's dominions; and the Court will not go into the question whether any other prison situated elsewhere in those dominions would be fitter. The other side will probably rely on sect. 38 of the Mutiny Act before mentioned, 20 Vict. c. 13, which enacts that "the place of imprisonment under the sentences of general Courts-martial shall be appointed by the officer commanding the district;" and will contend that no place other than that so appointed can be a proper place for the custody of the offender. In that view, Agra, the place of imprisonment for Lieut. Allen appointed by Lord Clyde, is the only place in which he can be lawfully confined. The view is, however, erroneous, and would lead to serious difficulties and inconveniences; as, for instance, in a case where the appointed prison became unavailable for the purpose, by being burnt down or otherwise destroyed. [COCKBURN, C. J.—It may be that such a case is a *casus omissus*.] Sect. 39 empowers the Secretary-at-War to set apart buildings as military prisons, to be deemed public prisons under the Act; and to make rules and regulations for the government and superintendence thereof, and of the officials, and of the offenders confined therein. Sect. 40 enacts that "Every governor, provost-marshal, gaoler or keeper of any public prison or of any gaol or house of correction in any part of Her Majesty's dominions, shall receive into his custody any military offender under sentence of imprisonment by a Court-martial upon delivery to him of an order in writing in that behalf from the
 *843] officer *commanding the regiment or corps to which the offender belongs or is attached, which order shall specify the period of imprisonment which the offender is to undergo, and the day and hour of the day on which he is to be released; and such governor, provost-marshal, gaoler or keeper, shall keep such offender in a proper place of confinement, with or without hard labour, and with or without solitary confinement, according to the sentence of the Court, and during the time specified in the said order, or until he be discharged or delivered over to military custody before the expiration of that time under an order duly made for that purpose." And by sect. 41, "In the case of a prisoner undergoing imprisonment under the sentence of a Court-martial in any public prison other than the military prisons set apart by the authority of this Act, or in any gaol or house of correction in any part of Her Majesty's dominions, it shall be lawful for the officer who confirmed the proceedings of the Court, or for the officer commanding the district," "to give as often as occasion may arise an order in writing directing that the prisoner be discharged, or be delivered over to military custody, whether for the purpose of being removed to some other prison or place, there to undergo the remainder or any part of his sentence, or for the purpose of being brought before a Court-martial either as a witness or for trial, and such prisoner shall, accordingly, on the production of such order, be discharged or delivered over, as the case may be." [HILL, J.—If you could show an order in writing, by Lord Clyde, for the prisoner's removal from Agra to the Queen's Prison in this country, it may be

that sect. 41 would make his detention here lawful. BLACKBURN, J.—It lies upon those who detain Lieut. Allen in custody *in this [*344 country for an offence committed in another, to show that they have strictly pursued some statutable authority, empowering them so to do.] If the Court sees that the prisoner has been convicted of a crime and ought now to be undergoing his sentence, they will not inquire into the propriety of the place of his custody. In the Canadian Prisoners' Case, 5 M. & W. 82, the return to a writ of habeas corpus to bring up a prisoner in the custody of the gaoler at Liverpool, for the purpose of discharging him, stated that the prisoner was indicted for high treason in Upper Canada, and before his arraignment petitioned the Lieutenant-Governor, in accordance with a colonial Act (which authorized the pardon of persons indicted for high treason on condition of being transported from the province), confessing his guilt and praying for a pardon on such conditions as the governor and council should think fit; that the governor granted such pardon, on the condition, assented to by the prisoner, that he should be transported to Van Dieman's Land for life; that, in order to carry out such transportation, it was found necessary to remove the prisoner, first to Quebec and then to England; and that, on his arrival in England, he was delivered by the captain of the ship which brought him over into the custody of the gaoler of Liverpool, to be kept while means were preparing to transport him to Van Dieman's Land. The Court refused to discharge the prisoner; on the ground that, even if the condition of the pardon were not lawful, or if, being lawful, the prisoner was not an assenting party to it, he was still liable to be tried for the treason in England, and therefore any subject might *detain him in [*345 custody until he was dealt with according to law. Lord Abinger, C. B., in delivering the judgment of the Court, said, 5 M. & W. 50, "The position of the prisoner appears to be this: that he has been indicted for high treason committed in Canada against Her Majesty; that he has confessed himself guilty of that treason; that he is liable to be tried for it in England; that he cannot plead the pardon which he has renounced; and that he is now in the custody of the gaoler of Liverpool, under such circumstances as would justify any subject of the Crown of England in taking and detaining him in custody until he be dealt with according to law. Any subject who held him in custody with a knowledge of the circumstances would be guilty of a crime in aiding and assisting his escape, if he be permitted to go at large without lawful authority. How then can we order the gaoler of Liverpool, or any other person who has him in custody, with knowledge of these circumstances, to let him go at large?" That case is an authority for the general proposition that a prisoner lawfully in custody is not entitled to his discharge on habeas corpus. [BLACKBURN, J.—That case proceeded on the special ground that the prisoner, being guilty of high treason and liable to be tried for it in England, might be detained there by any subject of the Crown.] In the present case the prisoner has been already convicted and sentenced by a Court of competent jurisdiction; and the original designation of the place of imprisonment was merely directory, and formed no part of the sentence, which may be carried out in any lawful prison. Sect. 38 of the Act speaks of the sentence of the Court-martial, and of the

*346] *place of imprisonment under the sentence, in separate clauses. The Court pronounces the sentence; the place of imprisonment is subsequently appointed by the officer commanding the district. [COCKBURN, C. J.—Sect. 41 appears to require an order in writing by the commanding officer, in order to warrant a change of the place of imprisonment.] It is doubtful whether that section applies, where the prisoner is originally confined in military custody.

Shee, Serjt., and *J. Brown*, contra, were not now called upon.(a)

COCKBURN, C. J.—I entertain no doubt that, upon the state of facts brought before us, the imprisonment of Lieut. Allen is illegal, and he is entitled to his discharge. Considering the nature of his offence, we may regret that any technical error in carrying out the sentence should have intervened, and that he should thereby be entitled to liberation before the sentence has expired. We have, however, to inquire whether the imprisonment which he is now undergoing is in point of law justifiable. I am clearly of opinion that it is not. He was tried for an offence which would have been cognisable only by the constituted civil tribunals, were it not for the special provisions of The Mutiny Act, and of the Articles of War incorporated therewith. These provisions empower a general Court-martial to try military persons accused of criminal offences; to find an accused person guilty; and to pass upon him sentence of imprisonment: but they do not *347] empower the Court to appoint the *place of imprisonment under the sentence. That power is given to the officer commanding the district. In the present case that officer, Lord Clyde, named Agra, in the East Indies, as the place of imprisonment; but we find that Lieut. Allen is now undergoing imprisonment, not there, but in this country. Such imprisonment is not in conformity with the mode in which his sentence is directed by the Act to be carried out. Then, has the change of the place of imprisonment been ordered by any one having authority under the Act so to order: for, if not, the change is contrary to common law and cannot be upheld? Now the only power to change the place of imprisonment, conferred by the Act, is that given by sect. 41 to the commanding officer of the district; the same person who, by sect. 38, is to appoint the place of imprisonment in the first instance. There is nothing before us at present to show that Lord Clyde, the officer commanding the district, has exercised the power given him by sect. 41; but unless he has done so the prisoner is entitled to his discharge. If, then, the Solicitor-General can obtain any further information, sufficient to satisfy us that Lord Clyde has ordered the place of the prisoner's imprisonment to be changed from Agra to England, the Court will pause before ordering the liberation of the prisoner; but if no such information is forthcoming, the prisoner must be discharged. In the meanwhile our present judgment is not final.

(WIGHTMAN, J., was absent.)

HILL and BLACKBURN, Js., concurred.

*348] *On the day following,(b) the Solicitor-General said that, in consequence of the suggestions of the Court, he had caused

(a) *Shee*, Serjt., was heard on the following morning. See post, p. 349.

(b) Saturday, November 24th.

inquiries to be made, the result of which had been embodied in the following affidavit, made by the assistant solicitor to the War department. "I have seen and perused the copy of a letter dated 'Horse Guards, 23d September, 1859,' addressed to Lord Clyde by Sir Charles Yorke, the then military secretary to His Royal Highness the Commander in Chief, directing his lordship to take steps for sending Lieut. W. H. C. Allen to England, if his lordship should consider that course advisable. I have seen and conversed with General Lord Clyde,^(a) who is now in England, on the subject of the said letter of 23d September, 1859; and he has informed me that, after consulting with the Governor-General of India, he directed the Adjutant-General of the Forces to issue an order addressed to the commanding officer of the fort at Agra, for the removal of W. H. C. Allen from that place to Calcutta, for the purpose of being embarked for England with a party of invalids in charge of the officer commanding the detachment. General Lord Clyde further informed me that the Adjutant-General was the proper officer to sign such an order, upon receiving his, Lord Clyde's, directions so to do; and that his lordship believes that it was in pursuance of such an order by the Adjutant-General of the Forces that the said W. H. C. Allen was removed from the fort at Agra to England; as the commanding officer of the fort at Agra *would not, according to universal practice, have allowed the said W. H. C. Allen to be removed, without the [*349 production of such an order. The Adjutant-General's duty is to issue orders in pursuance of directions given by the Commander in Chief, and such order, if made, I verily believe would, according to military practice, be kept and detained by the commanding officer of the fort at Agra, as his authority and justification for the course he had taken; and after diligent inquiry I have been, and am, unable to discover the existence of any such order in this country, and I verily believe that none such can be forthcoming."

Shee, Serjt., was then heard in support of the rule (*J. Brown*, who was with him, was not called upon).—First, supposing the hearsay evidence, contained in the affidavit just read, to be true in fact, the alleged order of the Adjutant-General was not the order of Lord Clyde, who alone was empowered, by sect. 41 of the Act, to change Lieut. Allen's place of imprisonment. [*HILL, J.*—A written order by the Adjutant-General, made under Lord Clyde's direction, would satisfy the Act. *BLACKBURN, J.*—The Act does not require the order to be under the hand of the officer commanding the district.] Assuming that to be so, an order to remove a prisoner to England was not warranted by the 41st section. It would require clear and express words, not to be found in that section, to give so arbitrary a power of removal to the military authorities; especially in the case of prisoners guilty of minor offences. The jurisdiction of the Court-martial to try persons accused of civil offences at all is exceptional, and the creature of the statute, coupled with the articles of war; nor is it to *be extended beyond the plain words of the enactment. By sect. [*350 24 the Legislature has guarded against the execution of a sentence of transportation or penal servitude, passed upon an offender by a Court-

(a) The Solicitor-General stated that this conversation took place on the preceding evening, Friday, November 23d.

martial in India, without an order by a Judge of one of the supreme Courts of Judicature; and it cannot have contemplated that a military officer should, *mero motu*, have power to order the removal of a minor offender from India to any other part of the Queen's dominions. [HILL, J.—It would be a strange omission in the Act, if no power was given to some authority or other to change the place of imprisonment of a prisoner confined for a long term in India. COCKBURN, C. J.—In cases in which sect. 41 does apply, it may be matter for serious consideration whether the power to change the place of imprisonment thereby given to the commanding officer must not be assumed to authorize a change only to some other place within that officer's military jurisdiction.] The power must be reasonably construed as subject to that limitation. But sect. 41 does not apply to the present case. This is apparent from a consideration of the preceding sections. Sect. 38 directs that the place of imprisonment under sentences of general Courts-martial shall be appointed by the officer commanding the district. By sect. 39 the Secretary-at-war may set apart buildings as military prisons, which are to be deemed public prisons within the meaning of the Act. By sect. 40 every governor, provost-marshal, gaoler, or keeper of any public prison is required to receive into his custody any military offender under sentence of imprisonment by Court-martial, on delivery to him of a written order to that effect from the officer commanding the regiment to which the offender belongs. Then follows sect. 41, which, in terms, is restricted to the case *351] of a prisoner undergoing imprisonment under the sentence of a Court-martial in any public prison other than the military prisons set apart by the authority of the Act, or in any gaol or house of correction in any part of Her Majesty's dominions. It does not appear whether the fort of Agra is a military prison set apart by the authority of the Act, neither does it appear that it is a public prison. It is, however, a military prison, and therefore not, in any case, a prison for the removal of a prisoner from which an order may be made, under sect. 41, by the officer commanding the district; inasmuch as that order is to direct that the prisoner be delivered over to military custody. The section assumes, therefore, that he is, prior to the order, in civil custody. One object of the enactment, probably, was that if the regiment to which an offender in civil custody belonged, was about to be removed to another station, he might be handed over to the military authorities and removed with it. Moreover, it is not to be supposed that the section applies to the removal of a prisoner from one part of the Queen's dominions to another. Otherwise, the commanding officer might exercise his own caprice in the choice of the country of the fresh prison. [COCKBURN, C. J.—The other side may contend that sect. 41 has that extensive operation, inasmuch as sect. 38 imposes no limits within which the prison, in which the prisoner is originally to be directed by the commanding officer to be confined, must be situate. Could not Lord Clyde, under sect. 38, have appointed, in the first instance, the Queen's Prison in England as the original place of confinement for Lieut. Allen?] The Legislature can never have intended to empower an officer in the East *352] Indies to call upon any goaler in England to receive and keep a prisoner, tried and convicted in India. [COCKBURN, C. J.—

By sect. 40 the order to the keeper of a prison to receive a military offender convicted by Court-martial is to be given by the officer commanding the regiment to which the offender belongs. There has been no such order in this case.] No; the only order, if any, was that of the Adjutant-General, by the direction of Lord Clyde. [*Atherton*, Solicitor-General.—The order was that of Lord Clyde, the officer commanding the district, and satisfied sect. 41. Lieut. Allen, having been removed under the order, is lawfully in England.] [*COCKBURN*, C. J.—The order is merely for the removal of the offender to England, not to any named prison in England. The order, if valid, would justify his imprisonment in any English prison.] [*The Solicitor-General*.—Conceding that the order was too wide, the Commander-in-Chief in England has supplied that deficiency, by designating the Queen's Prison as the place of imprisonment.] [*COCKBURN*, C. J.—There is nothing in the Act to give the English Commander-in-Chief power to interfere.] [*The Solicitor-General*.—If the Court sees that an offender, who has been convicted of felony by a Court of competent jurisdiction, is in a proper place of custody for undergoing his sentence; they will not inquire whether the particular prison is the right one.] [*BLACKBURN*, J.—The Commander-in-Chief would appear to be the person to whom a power to remove a military prisoner from one prison to another might most properly be intrusted; but I cannot find that the Legislature has given him that power.]

Shée, Serjt.—In the absence of an express power to that effect, the proceedings of the Commander-in-Chief are a direct infringement of sect. 9 of the Habeas Corpus Act, 81 Car. 2, c. 2, [*353 which enacts, "That if any person or persons, subjects of this realm, shall be committed to any prison or in custody of any officer or officers whatsoever, for any criminal or supposed criminal matter, that (a) the said person shall not be removed from the said prison and custody into the custody of any other officer or officers, unless it be by habeas corpus or some other legal right," and provides that persons making out a warrant for such removal, contrary to the Act, shall incur the pains and forfeitures mentioned in the Act. (He was then stopped.)

COCKBURN, C. J.—We postponed our decision in this case, in order to give the Solicitor-General an opportunity of procuring further affidavits. He has now brought under our notice an affidavit, the consideration of which satisfies me that it would be useless for us to postpone judgment any longer, or to enlarge the rule with a view to the further investigation of the facts; inasmuch as, assuming that the facts stated in the affidavit were fully established, I am of opinion that the rule must nevertheless be made absolute. It is unnecessary to determine the question which has been argued by my brother *Shée*, whether this case falls within the provisions of sect. 41 of The Mutiny Act of 1857. Even if it does so (and I am inclined to think that it does), those provisions have not been complied with, and, as the case now stands, no legal warrant exists by virtue of which the keeper of the Queen's Prison can hold Lieut. Allen in custody. Sects. 40 and 41 of the Act seem to be somewhat at variance. [His Lordship read

*354] them.] One section makes the order in writing of the officer commanding the regiment to which the offender belongs the condition upon which he is to be received and imprisoned by the keeper of a prison; by the other section, the like order of the officer commanding the district is the condition upon which a prisoner may be moved from one prison to another. The question might arise whether, even after the making of an order by the officer commanding the district, under the latter section, for the removal of a prisoner from one public prison to another, the keeper of the prison to which he is sent could be required to receive him without an additional order, under sect. 40, from the officer commanding his regiment. How this may be we need not now determine. It is enough to say that in the present case no order has been made, under either section, by virtue of which the keeper of the Queen's Prison can detain Lieut. Allen in custody. Assuming the truth of all the facts stated in the affidavit produced by the Solicitor-General, all that has taken place is, that Lord Clyde, the commanding officer of the district, having first directed, under the 38th section, that the place of the offender's imprisonment should be Agra, afterwards directed the Adjutant-General in India to make an order (which may be deemed for the present purpose to have been tantamount to an order by Lord Clyde himself) for the removal of the prisoner from Agra to England, with a view, no doubt, to his undergoing the remainder of his sentence in this country. It does not appear that any order has ever been made either by Lord Clyde as the officer commanding the district, or by the officer commanding Lieut. Allen's regiment, for the imprisonment of Lieut. Allen in the Queen's Prison, or for his reception into *355] custody by the keeper of that prison. The deficiency in this respect in Lord Clyde's order has been attempted to be supplied by the direction given to the keeper of the Queen's Prison to receive the prisoner, by the English Adjutant-General, representing His Royal Highness the General Commanding in Chief. But there is no provision in the Act to empower either His Royal Highness, or the Adjutant-General for him, to give any such direction in cases like the present. The custody in which Lieut. Allen now is, is, therefore, unlawful, because no legal order or warrant for his detention in it can be produced. There is a material distinction between this case and that of *The Canadian Prisoners*, 5 M. & W. 32, cited by the Solicitor-General. There, the prisoner who applied for a habeas corpus was liable to be tried in this country for high treason, and if discharged from custody might have been immediately re-apprehended by any one: consequently, the Court refused to liberate him, although he was not in the custody in which he ought properly to have been. Here, the prisoner is in custody in this country without any lawful cause, undergoing an imprisonment which is unlawful because justified by no legal warrant, and from which he is absolutely entitled to be liberated.

(WIGHTMAN, J., was absent.)

HILL, J.—I am of the same opinion. Lord Clyde, as the officer commanding the district, complied with the 38th section of the Act by naming Agra as the place for Lieut. Allen's imprisonment to undergo his sentence; and assuming, for the purposes of the case, that

the case falls within the 41st section, and that it *was open to Lord Clyde to give a subsequent order in writing, directing [*356 the prisoner's removal to some other prison or place, there to undergo the remainder of his sentence, the only order which Lord Clyde has given was one for the prisoner's removal to England. The prisoner is now found in this country and in the Queen's prison; and the question to be answered is, under what authority is he detained there in custody? The only warrant which can be produced is a document coming from the Horse Guards, signed by the Adjutant-General, stating Lieut. Allen's crime and sentence by an Indian Court-martial, and requiring the governor of the prison to keep him in confinement until his sentence expires. I find, however, no authority given by the Mutiny Act either to the Adjutant-General or to the Commander-in-Chief, to issue such a document. The only section of The Mutiny Act, so far as I can discover, which authorizes a gaoler to receive into custody and keep in confinement a military offender under sentence of imprisonment by a Court-martial, is sect. 40, which requires him to do so upon delivery to him of an order in writing in that behalf from the officer commanding the regiment to which the offender belongs. In the present case no such order is forthcoming. I am therefore constrained, very unwillingly I confess, to say that Lieut. Allen is illegally in custody and is entitled to his discharge.

BLACKBURN, J.—I am of the same opinion. In *The Canadian Prisoners' Case*, 5 M. & W. 32, circumstances appeared which showed that the detention of the prisoner, who applied for a habeas corpus, might be justified at *common law. He had confessed himself [*357 guilty of high treason; he had neither been tried nor pardoned; he was liable to be tried for that crime in this country; and any subject of the Crown might, at common law, detain him in custody. For those reasons the Court refused to discharge him. But, in the case before us, Lieut. Allen is detained in custody in this country under circumstances in which the common law would not detain him. The real reason for his detention is that he has been tried by a court-martial in India, and there sentenced to four years' imprisonment. The common law does not authorize his detention for such a cause. Recourse must therefore be had to some statutable authority by those who seek to justify it. The Mutiny Act, although it authorizes the detention of a prisoner in many cases, is no authority in the case before us. I need not repeat what has been said by the Lord Chief Justice and my brother Hill upon this point. I will only say that, giving full credit to what Lord Clyde says he believes was done in India, namely, that an order for the prisoner's removal to England was sent by the Indian Adjutant-General, by Lord Clyde's direction, to the commander of the fort at Agra, I agree with the rest of the Court, for the reasons they have stated, that the case is not thereby brought within any of the provisions of the statute, and consequently that Lieut. Allen cannot be detained in the Queen's Prison. It is a matter, however, for the serious consideration of the Government, whether they will not, for the future, revise the Mutiny Act, and make provision in it for a case like the present.

Rule absolute.

*358] *COBBETT v. WHEELER, JENKYNs and Others. Nov. 24.

Stat. 4 Jac. 1, c. 3, s. 2, enacts, that "In any action" "of trespass or ejectione firmæ, or any other action whatsoever, wherein the plaintiff" "might have costs (if in case judgment should be given for him)" if "the plaintiff" "after appearance of the defendant" "be nonsuited," "the defendant" "shall have judgment to recover his costs against every such plaintiff."

The General Turnpike Act, 3 G. 4, c. 126, by sect. 48 imposes a penalty upon a mortgagee of tolls who shall keep possession of the toll-gates and receive the tolls, after he has been satisfied the mortgage debt, with interest and costs. Sect. 74 directs that some one of the trustees of a turnpike road, or the clerk to such trustees, may be sued instead of the trustees; with a proviso that every such defendant shall be reimbursed, out of the turnpike funds, all such costs, charges and expenses as he shall be put to or become chargeable with or liable to, by reason of his being so made defendant.

Plaintiff, executor of a mortgagee of turnpike tolls, brought ejectment to recover the toll-gates; making the keepers of the toll-gates defendants to the writ. J., a trustee of the road, thereupon obtained leave to defend as landlord. Plaintiff was nonsuited, and defendants signed judgment for their costs, and took plaintiff in execution on a ca. sa.

Held, discharging a rule obtained by plaintiff to set aside the judgment and execution, that defendants were entitled to their costs. That, assuming that stat. 4 Jac. 1, c. 3, s. 2, makes it a condition to a defendant's right to costs, when the plaintiff is nonsuited, that the plaintiff, if successful, would, in the particular action, have been entitled to costs, the case was within the statute; sect. 48 of stat. 3 G. 4, c. 126, implying that plaintiff, if successful, would have recovered his costs, even if J. would, by sect. 74, have been exempted from personal liability to pay them; and, J.'s co-defendants not being, in any view of the case, exempt from such liability.

Quære, whether stat. 4 Jac. 1, c. 3, s. 2, does not give costs to defendants, where plaintiffs are nonsuited, in all actions in which, in general, successful plaintiffs would be entitled to costs.

Quære, also, whether, had plaintiff succeeded, J. would have been exempted, by stat. 3 G. 4, c. 126, s. 74, from personal liability to pay plaintiff's costs.

THE plaintiff in person had in this Term obtained a rule calling on the defendants to show cause why so much of the judgment signed in this action as related to the costs of the nonsuit and the execution issued thereunder should not be set aside, and why the plaintiff should not be discharged out of the custody of the keeper of the Queen's Prison as to this action.

The action was one of ejectment, brought by the plaintiff as executor of a deceased mortgagee, to recover certain toll-gates of a turnpike road in the county of Southampton. The defendants, other than Jenkyns, were toll-gate keepers, and appeared to defend as tenants;

*359] Jenkyns afterwards obtained an order to defend as landlord; he being one of the trustees of the said turnpike road. At the trial, at the Surrey Spring Assizes, 1856, the plaintiff was nonsuited for want of evidence of title by the production of the mortgage-deeds or otherwise, the defendants signed judgment in the usual way, on 26th April, 1856, and taxed their costs and issued a ca. sa., on which the plaintiff was taken in execution on 11th July, 1856, and had remained in custody ever since.

Lush now showed cause.—The plaintiff, in support of the rule, can rely only on the language of stat. 4 Jac. 1, c. 3, s. 2, which enacts that, "in any action, bill or plaint of trespass, or ejectione firmæ, or any other action whatsoever, wherein the plaintiff or demandant might have costs (if in case judgment should be given for him)," if "the plaintiff or plaintiffs, demandant or demandants, in any such action, bill, or plaint, after appearance of the defendant or defendants, be nonsuited," "the defendant and defendants" "shall have judgment to recover his costs against every such plaintiff and plaintiffs, demandant

and demandants." He must contend that this enactment does not entitle the present defendants to costs because the defendant Jenkyns, as a trustee of a turnpike road, would not have been personally liable to costs had judgment been given for the plaintiff. It is enacted, no doubt, by stat. 3 G. 4, c. 126, s. 74, "That the trustees" "of every turnpike road may" "be sued in the name" "of any one of such trustees" "or of their clerk" "for the time being:" "Provided always, that every such trustee" or "clerk" "shall be reimbursed and paid out of the moneys belonging to the turnpike road for which he" "shall act, all such costs, charges and expenses as he" * "shall be put unto, or become chargeable with, or liable to, by reason [360 of his" "being" "made" "defendant." That section, however, refers to actions brought against some one trustee, or the clerk of the trustees, of a turnpike road, as a nominal defendant representing the whole body of trustees; and does not apply to the present action, an ordinary action of ejectment, not brought in the first instance against Jenkyns, and to which he became a party only by his own act in obtaining leave to defend as landlord of the other defendants. [The plaintiff in person here referred to *Wormwell v. Hailstone*, 6 Bing. 668 (E. C. L. R. vol. 19).] In that case the defendant was the clerk to the trustees of a turnpike road, sued, as such, under stat. 3 G. 4, c. 126, s. 74; and it was held that execution could not be levied upon his personal goods, because the effect of that enactment was to make him a nominal defendant only. The present is not an action of that description. Had Jenkyns not been let in to defend, the defendants originally sued would clearly have been liable to costs, notwithstanding the statute, if the plaintiff had recovered; and Jenkyns, after voluntarily coming in to defend, stood in no better position than they. Under the old practice he would have made himself liable to costs by entering into the consent rule; and by the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, ss. 185, 186, the costs of an ejectment follow the judgment.(a) Even assuming, however, that the plaintiff, if successful, would have been deprived of costs as against Jenkyns, the * defendants are, nevertheless, now entitled to their costs as [361 against the plaintiff. Stat. 4 Jac. 1, c. 3, s. 2, relates to the class of actions in which, in general, the plaintiffs would be entitled to recover costs; not to any particular action the individual plaintiff in which would be entitled to costs against the individual defendant. The Statute of Gloucester (6 Ed. 1, c. 1, s. 2) having given costs to a successful demandant in ejectment, and stat. 23 H. 8, c. 15, having given a defendant costs upon the nonsuit of the plaintiff in actions of debt, trespass upon the case, detinue, account, &c., the object of the statute of James was to put on the same footing actions of trespass and actions of ejectment, and many other actions real and personal which, as the preamble to sect. 2 recites, were "within the same mischief as the said other actions were at the common law, and yet were omitted out of the provision of" stat. 23 H. 8, c. 15. Inasmuch, therefore, as ejectment is one of the class of actions in which, in general, a successful plaintiff is entitled to costs, the statute of James makes him liable

(a) The case where both parties appear at the trial and the plaintiff is nonsuited, is not provided for by the Act; but rule 29 of the Pleading Rules, Hil. T. 1853, entitles the defendant in such a case to judgment for his costs.

to costs if unsuccessful. Stat. 3 G. 4, c. 126, by sects. 47 and 48, assumes the right of a mortgagee to recover the toll-gates in ejectment, and to keep possession of them and receive the tolls, until he shall have received the full sum due on his mortgage, with interest and costs; the latter section rendering him liable to a penalty if he retains such possession longer than is necessary for that purpose. There is nothing in the Act to restrict his right to costs in any case. The present plaintiff, therefore, who sues as the executor of a mortgagee, is a plaintiff who, within the plain meaning of stat. 4 Jac. 1, c. 3, s. 2, "might have" had "costs, if in case judgment should" have been "given for him." By stat. 7 & 8 G. 4, c. 24, s. 3, it is enacted *362] that "execution shall not "issue against the goods and chattels of any trustee" of a turnpike-road, "by reason of his having acted as such trustee, or having signed or authorized or directed any contract or security to be entered into relating to any such road, unless in such contract or security such trustee shall have in express words rendered himself so personally liable." That enactment, however, cannot apply to the case of a trustee coming in voluntarily to defend an action of ejectment; and, even if it did, would not prevent a successful plaintiff from recovering his costs, though it would preclude him from enforcing his right to them against the individual trustee. (He was then stopped.)

The plaintiff, in person, contra.—Stat. 4 Jac. 1, c. 3, s. 2, gives defendants costs against a nonsuited plaintiff only in cases where the plaintiff, had he succeeded, would have had costs against each particular defendant. And *Wormwell v. Hailstone*, 6 Bing. 668 (E. C. L. R. vol. 19), shows that I should not, if successful, have been entitled to costs against the defendant Jenkyns.

COCKBURN, C. J.—I am of opinion that this rule must be discharged. The question is, whether the case falls within stat. 4 Jac. 1, c. 3, s. 2. And the first point is, whether the words of that enactment, "Any" "action whatsoever, wherein the plaintiff or demandant might have costs (if in case judgment should be given for him)," are meant to apply to the general class of actions in which a plaintiff, if successful, gets his costs; or to each particular action only, in which, under the particular circumstances of the case, the plaintiff would be entitled to costs. I think it is a very grave question whether Mr. Lush's is not *363] the proper construction of the statute. *But I will assume for the purposes of the argument, that the plaintiff's is the true construction; and that it is a condition to the liability, under the statute, of a nonsuited plaintiff to pay costs, that the defendant in the particular action would have been liable to pay costs if defeated. The question then arises, whether immunity against costs would have been given to the present defendants, if defeated, by The General Turnpike Act, 3 G. 4, c. 126, s. 74: upon which, and upon *Wormwell v. Hailstone*, 6 Bing. 668 (E. C. L. R. vol. 19), decided under it, Mr. Cobbett relies. Had it been necessary in the present case to determine what is the effect of that enactment, I should have wished to review that decision; for, as at present advised, it appears to me that when the statute, after giving a right of action against a nominal defendant, as representing the trustees of a turnpike road, goes on to provide that such a defendant shall be reimbursed, out of the funds belonging to

the road, all such costs, charges and expenses as he shall be put to, or become chargeable with or liable to, by reason of his being made defendant, the effect is not to dispossess the adverse party, the plaintiff, of his right to execution against the defendant, but merely to give the latter, after payment of the damages and costs recovered against him, a right to compensation out of the corporate funds of the body which he has represented in the action. It is not, however, necessary to decide that question here. Making the further assumption, for the purposes of the argument, that *Wormwell v. Hailstone* was rightly decided, we have still to consider the language of the statute of James. Making every assumption in favour of the plaintiff, the question comes back to this; whether the action *is one in which he might have had costs if judgment had been given for him: for, if so, [*364 he, being nonsuited, is liable to costs under stat. 4 Jac. 1, c. 3, s. 2. Now it is clear that the plaintiff, had he succeeded in the action, might have had costs. Stat 3 G. 4, c. 126, contains a special provision, in sect. 48, from which it is plain that the Legislature intended a mortgage of tolls to recover, in ejectment, not his debt and interest only, but costs also; inasmuch as he is thereby rendered liable to a penalty only in case he keeps possession of the toll-gates and receives the tolls longer than is necessary to satisfy him his principal with interest and costs. The case, then, falls within stat. 4 Jac. 1, c. 3, s. 2, even if that statute is construed in the restricted sense of its applying to particular actions only, in which the individual plaintiff would; if successful, have been entitled to costs; for Mr. Cobbett, if successful, would have been so entitled under stat. 3 G. 4, c. 126, s. 48, and could have enforced his right by the specific mode of taking possession of the toll-gates and receiving the tolls. Another very serious difficulty stands in the plaintiff's way, which has hardly been sufficiently referred to; namely, that, in addition to Jenkyns, a trustee of the road, the keepers of the toll-gates are also defendants; and that there is no pretence for saying that they, at all events, would not have been liable to pay the plaintiff's costs, had he succeeded. Either stat. 3 G. 4, c. 126, s. 48, is an answer to the plaintiff's contention, or, if it is not, the fact that several of the defendants would have enjoyed no immunity from costs, if defeated in the action, is as complete an answer. (WIGHTMAN, J., was absent.)

*HILL, J.—I am of the same opinion. The argument of the plaintiff is, that a plaintiff who is nonsuited is liable to costs [*365 only if the particular action be one in which he would, if successful, have recovered costs. Assuming (which I by no means admit) that that is the proper construction of the statute of James, the plaintiff must still fail; because, had he succeeded, he would have been entitled to recover both damages and costs.

BLACKBURN, J., concurred.

Rule discharged.

The HUNGERFORD MARKET COMPANY v. The CITY STEAMBOAT COMPANY (Limited). Nov. 18, 26.

A Company empowered by statute to take tolls in return for a public service is not bound, independently of express enactment, to exact the same tolls from all persons alike; but is at liberty to remit the tolls, or any portion of them, to particular persons, at its pleasure and discretion.

Stat. 11 G. 4, c. lxx., by which plaintiffs, a market Company, were incorporated, by sect. 76 empowered them to take from the master of any steamboat "in respect of every passenger landing on or embarking from the wharf or causeway" authorized by the Act to be made, "the" "tolls" "which" should "at any time or from time to time be fixed and appointed by" plaintiffs, not exceeding 2d. for each passenger. A subsequent Act, 6 & 7 W. 4, c. cxxxiii., incorporating another Company for the purpose of building a bridge from plaintiffs' market over the Thames, by sect. 53 authorized plaintiffs to levy the same tolls for passengers landing on or embarking from the northern pier of the intended bridge which stat. 11 G. 4, c. lxx. s. 76, had empowered them to levy. And by sect. 125 it was enacted, that "the tolls to be taken by virtue of" the "Act should at all times be charged equally," and that every "reduction or advance of" them should "extend to all persons whatever using the said bridge."

Plaintiffs, after the bridge had been built, fixed and appointed the toll to be received "under the 76th clause of" their "Act of incorporation, from the master of every steamboat" "in respect of every passenger landing on or embarking from" the northern pier, at 2d. But by agreement with defendants, a steamboat Company, they charged defendants a toll of 1s. 4d. per 100 of their passengers; and, by agreement with another steamboat Company, charged that Company a lower toll of 1d. per dozen of their passengers. Passengers landing on or embarking from the northern pier from or on to steamboats used no other portion of the bridge than the northern pier, which abutted on plaintiffs' land.

Plaintiffs having brought this action to recover from defendants arrears of toll for passengers at the rate agreed upon with defendants: held, that plaintiffs were entitled to recover the full amount. That stat. 11 G. 4, c. lxx. s. 76, was not an equality clause, requiring plaintiffs to charge the fixed and appointed toll in full for each passenger; but that it directed the toll to be fixed and appointed merely in order that the public might know the maximum toll they could be called upon to pay; leaving plaintiffs' right to lower or remit the toll, if it otherwise existed, wholly untouched. That in the absence of an equality clause in that Act such right did exist, and was not abrogated by stat. 6 & 7 W. 4, c. cxxxiii. s. 125, that enactment applying only to tolls taken by the bridge Company for the use of the bridge, and not to the tolls taken by plaintiffs.

THIS was an action brought for the recovery of tolls payable for *366] respect of passengers embarked *and disembarked from and on and in a float of the plaintiffs, attached to the northern pier of the Charing Cross Bridge, on to, and from steam vessels belonging to the defendants.

By consent, and by order of Blackburn, J., the following case was stated for the opinion of the Court, without pleadings.

The plaintiffs are the Hungerford Market Company, named in and incorporated by stat. 11 G. 4, c. lxx., a local Act, entitled "An Act to incorporate certain persons, to be called 'The Hungerford Market Company, for the re-establishment of a Market for the sale of fish, poultry, and meat, and other articles of general consumption and use, and for other purposes.'" In pursuance of that Act, the plaintiffs erected and built the new market, market house, shops, wharfs, and other hereditaments thereby authorized to be made and erected. The plaintiffs, also, pursuant to that Act, erected and made the wharf or causeway by that Act authorized to be so erected and made.

By the 76th section of that Act it is enacted, "That as soon as the said new market, market house, shops, wharfs, and other hereditaments, or any part of the same, shall be erected, made, and completed, it shall and may be lawful for the said Company and their successors to have, hold, and keep the said Market for the purposes

aforesaid, from thenceforth for ever, upon every day in the year (except Sunday, Good Friday, and Christmas Day), and also by themselves, or any of their collectors, farmers, officers, or servants, to ask, *demand, recover, receive, and take of and from all and every [*367 persons and person exposing or offering for sale or selling any meat, fish, poultry, vegetables, fruit, or other provisions, or any hay, straw, malt, meal, grain, or other commodities whatsoever, or who shall rent, use, or hire any stall or standing-place in any part of the said market, and also from all and every person and persons who shall embark or land from or upon the said wharfs any goods, wares, or merchandise, hay, straw, malt, meal, grain, meat, fish, poultry, vegetables, fruit, or other provisions or commodities (except in respect of such last-mentioned articles as shall be landed to be sold in the said market), and also from the master of any steam and other passage boats and vessels in respect of every passenger landing on or embarking from the wharf or causeway by this Act authorized to be erected or made, the several rents, tolls, stallages, wharfages, or sums of money which shall at any time or from time to time be fixed and appointed by the said Company or their successors, or by their directors, to be paid for the same, according to but not exceeding the several rents, tolls, stallages, wharfages, or sum or sums of money mentioned and specified in the second and third schedules to this Act annexed; any charter, statute, usage, or custom to the contrary thereof in anywise notwithstanding."

The toll or sum mentioned and specified in the second schedule to the said Act annexed, as payable in respect of passengers landing on or embarking from the wharf or causeway, is thus described and stated therein, namely, "On steam and other passage boats and vessels, according to the number of passengers which shall land on or embark from the wharf or causeway, at and after *the rate of and for [*368 each and every passenger, 2d. Which toll to be paid by the master of such vessel."

After the making of the said wharf or causeway, stat. 6 & 7 W. 4, c. cxxxiii., a local Act, was passed, intituled "An Act for building a foot bridge over the river Thames from Hungerford Market in the parish of Saint Martin in the Fields in the county of Middlesex to the opposite shore in the parish of Lambeth in the county of Surrey, and for making suitable approaches thereto." Sect. 53 of that Act is as follows:—"And whereas under and by virtue of the Act incorporating the said Hungerford Market Company" (the plaintiffs) "the said Company are authorized and empowered to receive certain tolls for or in respect of passengers and of baggage landing on or embarking from, or landed on or embarked from the wharf or causeway of the said market: And whereas it is in contemplation that the northern pier of the said intended bridge shall be and constitute a landing-place for passengers, instead of or in addition to the said wharf or causeway; be it therefore enacted, that it shall and may be lawful for the said Hungerford Market Company to levy and receive, for or in respect of each passenger and all baggage embarking or disembarking from, or landed at or embarked from or on the said pier or landing-place, or any float attached thereto, tolls of the same amount as the Hungerford Market Company are authorized to take by the said Act so incorporating the

said Hungerford Market Company in respect of passengers embarking or disembarking, and of all baggage landed at or embarked from the said wharf or causeway, with such and the same rights, privileges, *369] powers, authorities, and remedies as are now *possessed or capable of being exercised by the said Hungerford Market Company in respect of the tolls now payable to them in respect of their said wharf or causeway, as if the said pier was part and parcel of the said wharf: Provided always, that nothing herein contained shall authorize or empower, or be deemed or construed to authorize and empower, the landing, embarking, or disembarking of any goods, wares, or merchandise, or articles of trade or business, at the afore-said pier of the said intended bridge, without the special consent in writing of the said Suspension Foot Bridge Company."

The bridge authorized by that Act to be built has been so built, and is commonly called or known as the Charing Cross Bridge. The northern pier of the said bridge has, by means of a float attached thereto by the plaintiffs, been constituted a landing-place for passengers embarking or disembarking from and on the said float.

The directors of the Hungerford Market Company (the plaintiffs), after the said pier had been made and float attached, namely, on 17th May, 1859, passed the following resolution: "Resolved, that the amount of toll to be demanded, received and recovered by this Company, under the 76th clause of their Act of incorporation, from the master of every steamboat and vessel, in respect of every passenger landing on or embarking from this Company's landing-place, shall, on and after the 1st of June next, be the sum of twopence; but that this resolution shall be subject to such modifications as may have been agreed on, or may hereafter be agreed upon, in any particular cases, between this company and the owners or proprietors of steamboats or vessels." And the said directors accordingly fixed and appointed that toll to be paid and taken, as so resolved on.

*370] *Some years ago, it was agreed between the plaintiffs and the defendants, that the defendants should pay the tolls for all passengers landing or embarking from their steamboats on the plaintiffs' float; and the defendants have accordingly for several years paid the plaintiffs the tolls for such passengers. The rate of tolls charged by the plaintiffs, and paid by the defendants, has varied from 4s. 2d. per 100 passengers to 1s. 4d. per 100 passengers, which is the last rate paid by the defendants; and at this rate the payments would amount to about 400*l.* a year. The fares charged by the defendants to the passengers in their steamboats are very low, being only 1*d.* or 2*d.*, according to distance. The claim for reduction in tolls, made by the defendants from time to time, was based upon the reductions made by them in their passengers' fares. It was also, some years ago, agreed between the plaintiffs and The London and Westminster Steamboat Company, who have always paid the tolls to the plaintiffs for their passengers, that the plaintiffs, instead of being paid 2*d.* for each passenger embarked or disembarked from that Company's steam vessels from and on the said float, should be paid by the said Company no more than 1*d.* for each and every dozen passengers embarked or disembarked from the steam vessels of the said Company from and on the said float. The rate of toll charged to the said company has

varied from 4s. 2d. per 100 passengers to 1d. per dozen passengers, and this lower rate of toll has been paid by that Company for their passengers, and accepted by the plaintiffs throughout the period during which the tolls claimed in this action were incurred. The fare charged by The London and Westminster Steamboat Company to their passengers is uniformly 1d., *whatever may be [371 the distance traversed. The fare charged to the passengers by the boats of the defendants, for the distances for which the London and Westminster Steamboat Company charge 1d., is the same.

Since the reduction of the tolls payable to the plaintiffs by The London and Westminster Steamboat Company to 1d. per dozen passengers, several thousands of passengers have been embarked on and disembarked from the defendants' steam vessels from and on the said float; but, for the purposes of this case, it is agreed that the plaintiffs are proceeding in this action for the said toll of 1s. 4d. per 100, for and in respect of only 10,000 of them having so embarked and disembarked.

The defendants have refused to pay, and dispute their liability to pay, the said toll of 1s. 4d. per 100 passengers, on the ground that the plaintiffs are charging them a greater amount of toll than they charge the said London and Westminster Steamboat Company; the plaintiffs so charging the defendants with the said toll of 1s. 4d. for each and every 100 passengers so embarked and disembarked on and from the defendants' steam vessels, and charging the said London and Westminster Steamboat Company with the said toll of 1d. only, for each and every dozen passengers so embarked and disembarked on and from their steam vessels. The defendants dispute their liability to the said higher toll, under the provisions contained in the 125th section of stat. 6 & 7 W. 4, c. cxxxiii., which enacts as follows:—"Provided always, and be it further enacted, that the tolls to be taken by virtue of this Act shall at all times be charged equally, and that no reduction or advance in the said tolls shall either directly or indirectly be made partially or in favour of any particular person *or Company, but every such reduction or advance of tolls [372 shall extend to all persons whomsoever using the said bridge, anything to the contrary thereof in anywise notwithstanding." The plaintiffs contend that that enactment does not extend to the tolls in question.

The tolls in question are in no way claimed for or in respect of persons using the bridge; but the float in question is attached to the northern pier of the bridge, and there is no access to it from the land, except by passing over and along the northern end of the bridge to the pier, a distance of 400 feet or more, and down steps, forming part of the pier, to the float. All persons embarking on or disembarking from the defendants' steamboats, at the float, use the bridge in the above manner to get to shore, or from the shore to the steamboats.

The plaintiffs' right to take the tolls from the defendants was admitted: the only question in dispute being, as to whether or not the plaintiffs are bound in law to charge the tolls payable for steamboat passengers equally on the defendants' Company and The London and Westminster Steamboat Company, under the circumstances stated.

The question for the opinion of the Court was, Whether the plaintiffs were so bound. If the Court should be of opinion in the negative, judgment was to be entered for the plaintiffs; if in the affirmative, for the defendants.

Lush, for the plaintiffs.—There is nothing in either of their Acts to impose on the plaintiffs the obligation of charging a uniform toll to both the steamboat Companies in respect of their passengers. By the *378] original Act, *11 G. 4, c. lxx., sect. 76, the plaintiffs are empowered to charge, in respect of steamboat passengers landing on or embarking from their wharf or causeway, the tolls "which shall at any time or from time to time be fixed and appointed by the" plaintiffs, "not exceeding the" "tolls" specified in the second schedule to the Act; i. e., not exceeding 2d. for each passenger. Provided, therefore, the plaintiffs keep within that limit, they may, if they think fit, charge different tolls for different sets of passengers. [COCKBURN, C. J.—Does not the direction in the statute that the tolls are to be "fixed and appointed" seem to imply that a uniform toll for all persons is to be fixed?] The only object of that direction is to inform the public what the toll is, and to let them see that it is not in excess of the amount authorized by the Act. There could be no objection to a graduated scale of tolls, within the maximum limit, for different classes of passengers. [COCKBURN, C. J.—Can the plaintiffs first publicly fix and appoint the amount of toll, and then make private bargains with different steamboat companies varying the amount? HILL, J.—If so, the toll is fixed only subject to some future private bargain. By stat. 11 G. 4, c. lxx., s. 76, the toll is to be paid in respect of every passenger landing or embarking.] The toll payable in respect of each passenger is that which the plaintiffs choose to demand in respect of him. The effect of sect. 53 of the later Act, 6 & 7 W. 4, c. cxxxiii., is merely to give the plaintiffs the same right to levy toll in respect of steamboat passengers at the plaintiffs' landing float, which they had, under the original Act, at their wharf. Both Acts are alike silent as to any necessity for the plaintiffs to charge one and the same toll for every such passenger. The other side will rely on sect. 125 *374] *of stat. 6 & 7 W. 4, c. cxxxiii. But that section is in terms restricted to the tolls to be charged to persons using the bridge, and must be read in connection with sects. 122, 123, and 124, which also relate to such tolls exclusively. Those tolls are not levied by the plaintiffs, but by the Hungerford Bridge Company. The omission of the Legislature to enact an equality clause with reference to the tolls to be charged for the use of the landing float by the plaintiffs, The Hungerford Market Company, furnishes a strong argument that it was not their intention to enforce the same uniformity of charge in respect of such tolls. It must also be remembered that these tolls are taken by the plaintiffs by virtue of the earlier Act; whereas the tolls to which sect. 125 of the later Act refers were first imposed by that Act.

J. Brown, for the defendants.—Stat. 6 & 7 W. 4, c. cxxxiii. applies, in terms, to "the tolls to be taken by virtue of" that Act; and that the tolls taken by the plaintiffs in respect of the use by steamboat passengers of the landing float are such tolls is shown by sect. 53, which first empowered the plaintiffs to levy them; the earlier Act

making tolls payable in respect of the use of the plaintiffs' market and wharf only. It is the usual practice to introduce an equality clause into Acts of Parliament empowering Companies to levy tolls upon the public; and if there is any room for doubt as to the extent of the powers so conferred, the construction of the Act most beneficial to the public ought to be adopted: *Stockton and Darlington Railway Company v. Barrett*, 8 Sc. N. R. 641; *Stourbridge Canal Company v. Wheeley*, 2 B. & Ad. 792 (E. C. L. R. vol. 22). *Assuming, however, that the plaintiffs take these tolls by virtue of the [*375 earlier Act and not of the later, there is enough in the earlier Act, though it does not contain an express equality clause, to impose on them the duty of charging a fixed toll to all persons alike. Sect. 76 empowered them to charge, in respect of every passenger landing on or embarking from the wharf or causeway authorized by sect. 69 to be made, the tolls to be from time to time fixed and appointed by the plaintiffs to be paid for the same; by which must have been intended fixed and uniform tolls payable by or for every passenger alike. Although the rate of toll might be fixed from time to time, there were not to be different rates in existence at one and the same time. If the plaintiffs have the power of charging all but one favoured steamboat Company a maximum toll, and that Company a toll of a nominal amount, they can practically give the favoured Company a monopoly of the use of the pier, by charging all others so high a rate of toll as virtually to exclude them from it. Although no decision precisely in point with the present case can be found, *Rex v. Trustees of the Bury and Stratton Roads*, 4 B. & C. 361 (E. C. L. R. vol. 10), is very analogous. There, the trustees of a turnpike road were authorized by their Act to take at each and every of the several and respective turnpike gates erected on the road certain specified tolls. By another section it was made lawful for them, at a meeting to be holden for that purpose, whereof notice in writing was to be affixed on all the turnpike gates erected on the road, to lessen and reduce, and again to raise and advance, all or any of the tolls thereby granted; and such tolls, so reduced or *advanced, were to be collected as the tolls thereby [*376 granted. It was held that, under this Act, the trustees were authorized to reduce or advance any one of the four descriptions of tolls at all the gates, but not to reduce or advance them at one gate and not at another. Bayley, J., in delivering judgment, said:—"It seems to me to be quite clear, advertng to the Act of Parliament, that the power to reduce the tolls is only to reduce them at all the different gates. The Act imposes four descriptions of tolls to be taken at each and every of the several and respective turnpike or toll-gates. The first upon every horse, mule, or ass drawing any description of carriage; the second upon the same class of animals not drawing; the third upon every drove of oxen, cows, calves, &c.; the fourth upon every drove of hogs, swine, &c. It is clear, therefore, that in the first instance there was to be one uniform rate of tolls at all the gates. That must have been the understanding of the inhabitants near the road at the time when they consented to have the turnpike gates erected. Then there is a provision for reducing and advancing all or any of the tolls, and that provides that notice of the meeting of the trustees to be convened for that purpose shall be affixed on all

the toll-gates, and that the tolls so reduced or advanced are to be collected as the tolls thereby granted. Now I think that, as the notice is to be fixed upon *all* the gates, and as the toll granted by the Act of Parliament was one uniform toll to be collected at *all* the gates, the Legislature must have intended to give the trustees power to reduce or advance all the tolls, or any one of the four descriptions of tolls which they are authorized by the former clause to take at *all* *377] the gates, but that they did not intend to give them power to *reduce or advance the tolls at one gate and not at another. I think if they had intended to give the trustees such a power, they would have introduced an express clause into the Act of Parliament for that purpose." These observations are strongly in favour of the defendants in the present case; especially as the plaintiffs are required, by stat. 11 G. 4, c. lxx., s. 80, to "set up and maintain in some conspicuous part of the" "market a table of the tolls, wharfage, and stallage to be taken by virtue of" that Act. In *Lees v. The Manchester and Ashton Canal Company*, 11 East 645, the defendants were empowered by statute to take rates, not exceeding a maximum per ton per mile, upon coal; and to reduce the rates at a general meeting of their proprietors held after notice, and with the consent of a majority in value of such proprietors. The defendants made a contract, but not at a general meeting, whereby they agreed, for certain considerations, to carry coals for certain individuals at a lower rate than that fixed; and this contract was held to be illegal and void. Lord Ellenborough, C. J., in delivering the considered judgment of the Court, said:—"The public have an interest, that the canal shall be kept up, and whatever has a tendency to bring it into hazard is an encroachment upon their right in it. They have also an interest that the tolls shall be equal upon *all*; for if *any* are favoured, the inducement to the Company to reduce the tolls, *generally*, below the statute rate is diminished. But as it is sufficient in this case to say that this bargain is not binding upon the Company of proprietors, inasmuch as it abridges their rights in a way the statutes do not warrant, it is unnecessary to give an opinion whether it so interferes *with the *378] rights of the public, as to be on that ground also void."

Lush, in reply.—[The Court stated that they were agreed in his favour, on the point that stat. 6 & 7 W. 4, c. cxxxiii, s. 125, did not apply to the tolls taken by the plaintiffs.] There is no analogy between the present case and *Rex v. Trustees of the Bury and Stratton Roads*, 4 B. & C. 361 (E. C. L. R. vol. 10). That decision turned on the construction of the particular turnpike Act involved, and has no general application. [HILL, J.—Turnpike trustees have power, under their Acts, to compound with individuals for tolls. Do you say that the plaintiffs, in the absence of an express statutory power to that effect, are at liberty to reduce their tolls in favour of particular persons?] Yes, in the absence of an express prohibition in their Act. Stat. 11 G. 4, c. lxx., s. 76, cannot be converted, by any ingenuity of argument, into an equality clause. A direction not to take more than a fixed toll in respect of each passenger is not equivalent to a direction not to take less than that toll in respect of any passenger. The matter, therefore, stands thus: that the Legislature, having imposed no equality clause by that Act on the plaintiffs, by the later Act, 6 &

7 W. 4, c. cxxxiii., did impose an equality clause (sect. 125) on the Hungerford Bridge Company, but not on the plaintiffs; thereby showing an obvious intention to leave the plaintiffs as unfettered in this respect as before.

Cur. adv. vult.

COCKBURN, C. J., now delivered the judgment of the court.(a)—The facts of this case are as follows. The *Hungerford Market Company were, by their Act of incorporation, 11 G. 4, c. lxx., [*379 sect. 76, empowered to take, in respect of commodities embarked or landed at a wharf to be erected by them under the powers of the Act, as also from the masters of all steamers or passage boats in respect of passengers embarking or landing at such wharf, such tolls, within the maximum specified by the Act, as should at any time or from time to time be fixed and appointed by the Company. An Act was subsequently passed, 6 & 7 W. 4, c. cxxxiii., for building a footbridge over the Thames from Hungerford Market. The 58d section of that Act, after reciting the foregoing provision of the Hungerford Market Act, and that it was contemplated that the northern pier of the bridge should be a landing place for passengers, instead of, or in addition to, the wharf, empowered the Hungerford Market Company to levy and receive, in respect of all passengers and baggage embarking or disembarking at the said pier or landing place, or any float attached thereto, the same tolls as they were empowered to take at their wharf under the former Act. The bridge having been built, and the northern pier having been used as a landing place, The Hungerford Market Company have fixed and appointed the rate of tolls to be paid, conformably to the requirement of stat. 11 G. 4, c. lxx.: but they, in practice, make a distinction between different steamboat Companies; charging a higher rate of toll, though not exceeding the amount fixed, to those who charge a higher fare to passengers, and a proportionately lower toll to those who carry passengers at a cheaper rate; with the object, as they allege, of encouraging the cheaper rate of conveyance in order to attract a greater number of passengers, and *thereby to increase their revenue. The [*380 defendants, The City Steamboat Company, who, under this arrangement, are called upon to pay the higher toll, object, contending that the Hungerford Market Company are bound to charge an equal toll in respect of every passenger, without distinction. The question for our decision is whether the Hungerford Market Company are under this obligation. We are of opinion that they are not. There is no clause in either of the local Acts, rendering it the duty of the Hungerford Market Company to charge equal rates on all who use the wharf or the pier. The later of the two Acts has, it is true, an equality clause;(b) but it is clear that this clause applies only to tolls taken by the Hungerford Bridge Company. The Act is silent as to any such obligation, on the part of the Hungerford Market Company, with respect to any tolls taken by them. We were at first struck with the argument that, as by the 76th section of the Hungerford Market Act,(c) the tolls authorized to be taken are required to be fixed and appointed by the Company, a toll lower than that so fixed and

(a) Cockburn, C. J., Hill and Blackburn, Js.

(b) Stat. 6 & 7 W. 4, c. cxxxiii. s. 125.

(c) 11 G. 4, c. lxx.

appointed could not be properly considered as coming within the terms of the power. But we think a sufficient answer to this argument was given by the counsel for the plaintiffs, and that the true construction of the clause in question is, that the tolls must be fixed and appointed in order to communicate to the public or persons interested the maximum toll they can be called upon to pay; leaving the right of the Company to lower or remit the tolls, if it otherwise exist, wholly untouched. We have therefore to consider whether a Company entitled to take tolls in return for public service is bound, independently of express provision, to exact the same tolls from all persons alike, or is at liberty, if so minded, to remit the tolls, or any portion of them, to particular individuals at its pleasure and discretion. No authority has been adduced for the former of these propositions. In *Lees v. The Manchester and Ashton Canal Company*, 11 East 645, the observations of Lord Ellenborough go no further than to show that, on grounds of public policy, it may be desirable that such an obligation should attach to the power of a public Company to take toll. Yet authority would certainly seem to be required to establish a proposition directly at variance with the well known axiom that everyone is at liberty to renounce a right established in his favour. The power to take the tolls is conferred on the Company in consideration of service to be rendered, and accommodation to be afforded, to the public. If the service be rendered and the accommodation afforded, the obligation of the Company is fulfilled. If it omit to exact the toll which is the consideration for the service, the shareholders would seem to be the only persons who can have a right to complain. The argument sought to be drawn from the fact that it has been the habit of the Legislature in modern times, when conferring on Companies powers to construct great public works and to take tolls in respect of them, to introduce provisions for ensuring that such tolls shall be levied equally on all, is only available to establish that, in the opinion of the Legislature, it is, as a matter of public policy, desirable that this equality should be observed. Such express enactment seems, on the other hand, to amount to a legislative recognition of the fact that, in its absence, a power to take tolls does not necessarily imply an obligation to exact them uniformly from all persons alike. The powers of The Hungerford Market Company were conferred before the practice of introducing what are called "equality clauses" into private Acts of Parliament had sprung up. The Hungerford Bridge Act appears to have been one of the first Acts into which such a clause was introduced. There is nothing, therefore, to lead us to suppose that, when the Hungerford Market Act was passed, the Legislature had adopted the view on which it appears since to have acted. At all events, the omission to extend the provision as to equality, expressly imposed by the Hungerford Bridge Act on the Hungerford Bridge Company, to the Hungerford Market Company, in respect of the tolls which the latter were by that Act authorized to take, is strong to show that no such obligation had been imposed by implication by the Hungerford Market Company's Act. No such obligation having been imposed by the original Hungerford Market Company's Act, and the powers given to this Company in the latter Act being as it were in substitution, so far as the pier was concerned,

of those given by their own Act, it may have been deemed unjust to impose this obligation *ex post facto* by the subsequent Act. The result then is that, in our opinion, there neither arises upon these Acts of Parliament, nor exists at common law, any obligation on this Company to exact uniform tolls, provided they keep within the amount fixed and appointed conformably to stat. 11 G. 4, c. lxx.; and that, consequently, our judgment must be for the plaintiffs.

Judgment for the plaintiffs.

***SMITH, Appellant, v. The Overseers of St. MICHAEL, CAMBRIDGE, Respondents. Nov. 17, 26. [*383]**

Appellant, distributor of stamps at C., rented a house there at 5*l.* 10*s.* per annum. By agreement with the Commissioners of Inland Revenue he let five principal rooms and a closet, in this house, for the use of the surveyor of taxes and of the collector of Inland Revenue for C. By the agreement, possession was to be given and rent to commence at a given time, and appellant was to be paid "the annual consideration of 90*l.*; this sum to include all expenses, namely, rent, rates, taxes, gas, wood, coals, also providing a trustworthy person to reside on the premises, to keep clean, light fires, and attend to the same." One other room in the house was occupied by appellant as an office for vending stamps and transacting other public business connected with his duties as stamp distributor. He employed an assistant in this room, who also took in there for him private orders for printing, which he executed elsewhere. The remainder of the house, consisting of two kitchens and a cellar on the basement, and a sitting room and two bedrooms on the second floor, was occupied by a man and his wife and daughter, under an agreement by which appellant, besides allowing him to live rent free, paid him 6*l.* 10*s.* yearly and found him with coals and candles; he in return cleaning the rooms and lighting the fires. Appellant exhausted, annually, the whole of the 90*l.* payable to him under the first mentioned agreement, with the exception of 5*l.* 10*s.*, in paying his own rent; the expenses of coal, fuel and gas; the wages of the man before mentioned; and other incidental expenses.

On a case stated for this Court, on an appeal by appellant to Sessions against a poor-rate for C. to which he was rated on the full annual rateable value of the whole house: Held, that appellant was properly rated; for that he was the beneficial occupier of the whole house in his capacity as a subject. That the five rooms and closet were not in the separate possession of the revenue officers; and the fact that appellant's benefit, in respect of that part of the house, was derived from payments made to him by servants of the Crown for privileges given to them in that capacity, did not exempt him from rateability: and that the room occupied by appellant himself was not occupied by the Crown through him as its servant.

ON an appeal to the Cambridge Borough Quarter Sessions, by the appellant, against a poor-rate for the parish of St. Michael, in that borough, made on 15th July, 1859, the Sessions stated the following case for the opinion of this Court:—

The appellant is, and at the time of making the said rate was, the tenant of the house No. 8, Rose Crescent, in the parish of St. Michael. The rent paid by him to Charles Claydon, the owner of the house, is 5*l.* 10*s.* per annum. A portion of the house, consisting of five of the principal rooms thereof, is, and at the time of *making the [*384] rate was, occupied by the surveyor of Her Majesty's taxes, and by the collector of Inland Revenue, under the following agreement:—

"Cambridge.—With a view of concentrating all the Inland Revenue Offices in Cambridge in one central building, situate and being No. 8, in Rose Crescent, in the parish of St. Michael, in the town and county of Cambridge, I, Henry Smith, distributor of stamps at Cambridge, on the one part, do hereby covenant and agree to let to the Honour-

able Board of Inland Revenue five rooms and a closet in the aforesaid building, for the purposes hereinafter mentioned, retaining the front shop in my own possession, as the stamp distributor's office; and I, Stephen Roose, collector of Inland Revenue for Cambridge collection, on behalf of the Honourable Commissioners of Inland Revenue, on the other part, do hereby agree to take the five rooms and closet referred to above, for the purposes and subject to the conditions hereinafter mentioned, namely:—

"Ground floor, No. 1. For the surveyor of taxes' office; being the first room as you enter on the left hand side, with a closet therein.

"No. 2. For the Journal office; being the back room on the same floor.

"First floor, No. 3. For the collector's public receiving office: being the front room, with a closet therein.

"No. 4. For the collector's private office, and adjoining the public office.

"Second floor, No. 5. For the surveyor of taxes' store of blank forms; being immediately on the right hand on the upper stairs, with a closet opposite No. 5 for excise stores, &c.; and also the general use *385] of the watercloset. For the annual consideration of 90*l.*; this *sum to include all expenses, namely, rent, rates, taxes, gas, wood, coals, also providing a trustworthy person to reside on the premises to keep clean, light fires, and attend to the same.

"Possession to be given and rent to commence on 25th March, 1858; such rent to be paid half yearly, namely, on 29th September, Michaelmas, and on 25th March, Lady Day, in each year. As witness our hands this 24th February, 1858.

• "HENRY SMITH, Distributor of Stamps for Cambridge.

"STEPHEN ROOSE, Collector of Inland Revenue, on behalf of the Commissioners of Inland Revenue, London.

Another part of the house, consisting of one room only, is, and at the time of making the rate was, occupied by the appellant solely and exclusively, with the exception hereinafter stated, as an office for the vending of stamps by him as distributor of Stamps for the Cambridge district, and for the transaction of public business connected with his office of distributor of stamps for the said district. The remainder of the house, consisting of two kitchens and a coal cellar in the basement, and three rooms on the second floor (one whereof is used as a sitting-room and the other two as bedrooms), is occupied by a person named Wood and his family, under the circumstances hereinafter stated. The appellant has agreed with Wood that the latter shall live upon the premises, and he pays Wood 6*l.* 10*s.* yearly, besides allowing him to live rent free and finding him with coals and candles. For this payment and allowance Wood, whose family consists of himself, his wife and daughter, cleans the rooms and lights the fires, and *386] he has the exclusive use of the kitchens, and of two of the said *rooms on the second floor. The appellant employs an assistant in his office, who also takes in orders under the advertisement hereinafter mentioned; and the appellant is paid by a commission on the stamps sold by him. The appellant is the printer of The Cambridge Independent Press newspaper, published in Cambridge, and carries on a separate and distinct business as a printer, residing in a

house on the Market Hill, where the business of printing and publishing the said newspaper is carried on, and where he carries on such private printing business. In the said newspaper, published on 21st December, 1859, and on subsequent days, there appeared the following advertisement:—"Printing of every description economically, expeditiously and neatly executed, at 11, Market Hill, and 8, Rose Crescent, Cambridge, where all orders will be thankfully received." Similar advertisements appeared in other publications. The No. 8, Rose Crescent, mentioned in the said advertisement, is the house in question. Previously to occupying the said house, the appellant occupied and used, as an office for the vending of stamps, a shop in a house opposite, for which he paid a rent of 14*l.* a year; and no abatement was made in the amount at which that house was rated, on account of such part thereof being so occupied.

The appellant is rated to the house duty in respect of the said house.

The rent of 90*l.* per annum payable to the appellant under the said agreement is, with the exception of 2*l.* 10*s.* per annum, exhausted by payments made by the appellant for the following purposes, that is to say, the said rent of 52*l.* 10*s.* per annum to the said Charles Claydon; the expenses of coal, firewood and other fuel, *gas, wages to a person employed to reside on the premises in order to take [*387 care of the same, tenant's repairs, and other incidental expenses.

The appellant is rated for the said house in the said rate on the sum of 42*l.*, being the full annual rateable value thereof, after making the deductions required by law.

The question for the opinion of the Court was, whether the appellant was liable to be rated in the said rate, in respect of the said house or any part thereof.

The rate was to be affirmed or quashed according as the Court should be of opinion that the appellant was or was not liable to be so rated in respect of the whole of the house; and was to be amended if the Court should be of opinion that he was liable to be so rated in respect of part only of the house.

O'Malley, for the respondents.—The appellant is liable to be rated as the beneficial occupier of the whole of the house. No part of the house is in the exclusive occupation of servants of the Crown, for Crown or Government purposes. It is a private house, rented by the appellant as a private person; he deriving a profit from his occupation of the whole. It is true that that profit is partly derived from the payment which he receives from the Commissioners of Inland Revenue for the five rooms and the closet which are used by the surveyor of taxes and the collector of Inland Revenue. Those persons, however, are merely in the position of lodgers, paying for the use of the rooms and for the other accommodation afforded them; and no legal distinction exists between the profits which the appellant derives from them and those which he derives otherwise from the house. **[BLACKBURN, J.—I suppose that the other side will con-* [*388 tend that the agreement amounts to a demise of the five rooms and closet.] It has no such effect; the stipulation that the appellant is to pay rent and other outgoings, and to provide a trustworthy person to reside on the premises to keep them

clean, &c., displaces such a construction. Again, the appellant is not entitled to exemption from rateability in respect of the room which he himself occupies for the purpose of distributing stamps. It appears from the case that he also takes in orders there in the way of his private business as a printer. But, assuming that he used the room for no other purpose than that of vending stamps, there is nothing in the case to show that the locality is essential for that purpose. The room is not found him by the Commissioners of Inland Revenue, nor do they require him to reside there, or consider the occupation of it as part of his remuneration. He is paid by a commission on the stamps which he sells; and this he receives irrespectively of the place of sale. He, therefore, no more occupies the room in question as a servant of the Crown, than a stationer who is licensed to sell stamps in his private shop occupies the shop as such a servant; or, indeed, than the Attorney-General can be said to occupy his chambers as a servant of the Crown. The fact that the Crown does not require the appellant to reside in this particular house for the discharge of his duties distinguishes the case from *Regina v. Stewart*, 8 E. & B. 360 (E. C. L. R. vol. 92), and *Gambier v. Lydford*, 3 E. & B. 346 (E. C. L. R. vol. 77).

Lush, *contrà*.—The agreement between the appellant and the Commissioners of Inland Revenue amounted *to a present demise
*389] of the five rooms and closet; and the officers of the Commissioners have a separate possession and exclusive occupation of them, as undertenants to the appellant. Pro tanto, therefore, the appellant is not liable to be rated. Apart, indeed, from the question of exclusive occupation, he is exempt from rateability in respect of these rooms, on the ground that they are used only by servants of the Crown for the performance of their duties. This latter ground of exemption applies also to the appellant's own occupation of the room which he uses for vending stamps. The facts show that the different parts of the house are occupied or used by different servants of the Crown, solely for the performance of their respective duties under the Crown. There is, therefore, no such beneficial occupation by a subject as can make the appellant rateable.

O'Malley, in reply.—The question is, whether the house consists of one or of two tenements, and by whom it or they is or are occupied. If the appellant occupies the whole, he is rateable for the whole, no matter what lodgers he takes, or what the purposes for which they use the rooms in which they lodge. It is clear, from the facts that he does occupy the whole, and that the revenue officers are not underlessees.

Cur. adv. vult.

HILL, J., now delivered the judgment of the Court.—In this case, which was argued before my Brother Blackburn and myself, we took time to consider whether the appellant was to be considered occupier of the whole of the house in respect of which he was rated, or whether
*390] five rooms and a closet in that house were in the *occupation of the Commissioners of Inland Revenue. There is no doubt that exclusive possession of a part only of a house may be given, so as in effect to make the two parts of the house separate tenements: the question in the present case was, whether such possession had been given; and we are of opinion that it had not. The agreement be-

tween the appellant and the representatives of the Commissioners of Inland Revenue is set forth in the case. By it the appellant contracted to give to the Inland Revenue the exclusive enjoyment of five rooms and a closet in his house; and in the agreement it is expressed that the appellant "agrees to let" and the other party takes the rooms, and it is stipulated that "possession" shall be given and rent commence at a particular time, all of which are words properly applicable to a demise of the five rooms. But at the same time it is stipulated; "For the annual consideration of 90*l.*: this sum to include all expenses, namely, rent, rates, taxes, gas, wood, coals, also providing a trustworthy person to reside on the premises, to keep clean, light fires, and attend to the same." We think that we must look not so much at the words as the substance of the agreement; and, taking the whole together, we think it must be construed, not as a demise of the five rooms, but as an agreement by which the appellant, retaining possession of those rooms and keeping his servant there, bound himself to supply the other party there with fire and gas and attendance. It is true that the exclusive enjoyment of the rooms is to be given; but that is the case where a guest in an inn or a lodger in a house has a separate apartment, or where a passenger in a ship has a separate cabin; in which case it is clear that the possession remains in the *innkeeper, lodging-house keeper, or shipowner. We think, therefore, that the appellant was occupier of the whole of the rated property. [391

The other points in the case were disposed of during the argument. It is established law that if property is in the occupation of the servants of the Crown for public purposes, it is exempt from rates. The reason is thus expressed by Lord Campbell in *Smith v. Guardians of Birmingham*, 7 E. & B. 488, 489 (E. C. L. R. vol. 90): "No property can be rated unless there be a subject having a beneficial occupation in respect of which he may be rated." In the present case the appellant is a subject, occupying in his own right the house in question, and deriving benefit to himself from his occupation. It is true that the benefit which he derives arises partly from payments made to him by the servants of the Crown, for privileges given to them in that capacity; but there is no authority, nor do we see any reason on principle, for extending the exemption to such a case. As to the room which the appellant himself occupies, and in which he distributes stamps, there is no pretence for saying that the Crown occupies that room through him as its servant.

Judgment, therefore, must be given in support of the rate.

Rate affirmed.

*The QUEEN, on the prosecution of the The Churchwardens and Overseers of the Township of RUSHTON SPENCER, [392 Respondents, *v.* The NORTH STAFFORDSHIRE Railway Company, Appellants. Nov. 17; Nov. 21; Nov. 26.

Deductions from rateable value held allowable to a railway Company, upon assessment to poor-rate, in respect of the portion of their line passing through, and of the station, buildings and sidings within, a township, on the following principles.

1. That the percentage amount to be allowed the Company for interest on capital and tenant's profits was to be calculated upon the depreciated value of the rolling stock at the time the rate was made, not upon its cost price.

2. The Company being obliged to provide (in addition to the rolling stock), turntables, cranes, weighing machines, stationary steam-engines, lathes, electric telegraph and apparatus, office and station furniture, and gas works used for supplying the stations with gas: Held, that a deduction should be allowed for interest on capital and tenant's profits, in respect of such of these articles as were movable; for instance, the office and station furniture: but not in respect of such of them as were either so attached to the freehold as to become part of it, or, though capable of being removed, were so far attached as that it was intended that they should remain permanently connected with the railway or the premises used with it, and remain permanent appendages to it, as essential to its working.

3. It being necessary, in order to carry on the business of the railway, that the Company should have in hand, at command, a sum of money by way of floating capital, for providing surplus stores (as rails, sleepers, &c.), to be used in case of accident on the line, or other emergency, and partly for paying the wages of servants of the Company and other current expenses: Held, that the question whether a deduction should be allowed, for interest and tenant's profits, or either, upon this floating capital, must depend on whether, on the whole capital employed, a greater delay occurred in realizing the returns than is ordinarily incident to the employment of capital. That a deduction was allowable in respect of any such delay, but not in respect of a delay in realizing the profits on a part only of the capital, if compensated by the more than ordinary quickness of the return on the rest.

4. That the deduction to be allowed in respect of the stations, buildings and sidings along the line, must be calculated on the actual value at which they ought to be assessed, and not upon the original cost of construction.

UPON appeals by The North Staffordshire Railway Company against two rates made for the relief of the poor of the township of Rushton Spencer, in the county of Stafford, the following case was, by consent and by order of Hill, J., stated for the opinion of this Court, under stat. 12 & 18 Vict. c. 45, s. 11.

*393] The North Staffordshire Railway passes through the township of Rushton Spencer for a distance of 104 chains, and, in respect of this portion of their line of railway, and the station, buildings, and sidings within the said township, the appellants are assessed in each of the said rates upon a net rateable value of 219*l*. The appellants and respondents have agreed to take, as the gross earnings in the said township of Rushton Spencer for one year, the sum of 1761*l*. The total working expenses of the whole line for one year, ending 30th June, 1858, including rates and taxes and Government duty, and certain tolls payable to The Midland Railway Company, amounted to the sum of 132,290*l*. (The several items composing this sum were then set out.) Of which sum of 132,290*l*. it has also been agreed that the sum of 965*l*. is the fair proportion chargeable to the said township of Rushton Spencer, and to be deducted from the said gross earnings in ascertaining the net rateable value of the said line in the said township. The appellants and respondents differ as to certain other items of deduction hereinafter mentioned.

The rolling stock of the Company, which includes all the locomotive engines, tenders, passenger carriages, horse boxes, carriage trucks, luggage vans, goods, cattle, and mineral wagons, and all other vehicles of every kind for the conveyance of persons, cattle, animals, goods, wares, minerals, merchandise, or other articles, matters, or things whatsoever, on the railway, cost the Company the sum of 356,843*l*. And for the purposes of this case it is admitted that this was a fair price at the time the articles constituting the rolling stock were purchased; and also that similar articles would at the time of laying the rate have cost as much. In addition to this stock the Company has *394] been obliged to provide, at a cost of 52,950*l*, turn tables, cranes, weighing machines, stationary steam engines, lathes,

electric telegraph and apparatus, office and station furniture, and gas works used for supplying the stations with gas. The turn tables and some of the weighing machines are affixed to the freehold by means of an iron rod inserted in a large stone sunk in the land. The lathes and steam engines are connected with the buildings in which they are placed by means of iron bolts. The electric telegraph apparatus consists, first; of posts driven into the ground; Secondly; of wires passed through sockets annexed to such posts, but which wires may be disconnected from the posts without injuring or displacing them; Thirdly; of the electrifying machines, which are in no way affixed to the freehold. The gas works consist partly of buildings and partly of gasometers, retorts, and the other usual plant for making gas; and of the pipes for conveying the same from the works to the railway stations. The other weighing machines, which are all used for the purposes of the traffic on the line, and the office and station furniture, are unconnected with the freehold. Beyond these amounts of capital, the Company allege, and for the purposes of this case it may be admitted to be the fact, that it has been found necessary, in carrying on the traffic and business of the railway, that the Company should have in hand, at command, a sum of money by way of floating capital, for providing surplus stores (such as rails, sleepers, &c.), to be used in case of accident on the line or other emergency, and partly for paying the wages of porters, pointsmen, and other servants of the Company, and the other current expenses of the line, which are for the most part paid weekly or at other short periods; whilst it is found *necessary to give credit to some of the goods' traffic customers of the Company to a large amount and for various periods. [*395 The traffic over the whole of the Company's line of railway is worked under a contract between the Company and the contractors, Messrs. Joseph and Henry Wright, which contract, it has been agreed, shall form part of this case. The total amount of the deductions made by the Company from the contractors, at the time when the rates were made, in respect of the depreciation of the rolling stock and plant in the hands of the contractors, was 71,000*l.*, which sum would not be more than sufficient to restore the said rolling stock and plant to its original value; but which sum, it is admitted, has not been expended in such restoration.

The Company have also expended in the erection of their stations, buildings and sidings the sum of 860,000*l.*

The respondents contend that the deduction to be allowed in respect of interest on capital and tenant's profits ought to be ascertained by taking, as the capital sum upon which such interest and profits ought to be calculated, the actual or depreciated value of the rolling stock at the time the rates were made; and that no allowance for interest and tenant's profits should be made in respect of a floating capital. The respondents also contend, that the deduction to be allowed in respect of the turn-tables, cranes, weighing machines, stationary steam engines, lathes, electric telegraph apparatus, gas works, stations, buildings and sidings, ought to be ascertained by taking the amount at which they are collectively assessed to the relief of the poor in the several parishes and townships within which the same are severally.

396] situated, and dividing the said amount amongst each *parish and township in a certain proportion agreed upon between the respondents and appellants.

The appellants contend that they are entitled to claim, as the proper deduction in respect of interest on capital and tenant's profits, the percentage amount calculated upon the whole amount of the said capital sums of 856,843*l.*, 52,950*l.*, and the floating capital. They also contend that the proper deduction to be allowed in respect of all the stations, buildings and sidings, is 6*l.* per cent. per annum (which is a moderate rate of interest for money invested in buildings) upon the original cost of construction, and to take the annual amount so ascertained as the value to be deducted. And it is agreed, with reference to this head of deduction, that the original cost of construction of the whole of such stations, buildings, and sidings was 360,000*l.*

The questions for the opinion of the Court were:

First. Whether the percentage amount to be allowed for interest on capital and tenant's profits was to be calculated upon the capital invested in the rolling stock taken at its cost price, or upon the depreciated value of the rolling stock as estimated at the time when the rates were made, or at any other time.

Secondly. Whether the appellants were entitled to a deduction, for interest on capital and tenant's profits, upon the said sum of 52,950*l.*, the additional amount of capital invested in turn-tables, cranes, weighing machines, stationary steam-engines, lathes, electric telegraph and apparatus, office and station furniture, and gas works, or upon any and what portion of such items; and, if so, whether upon the sum originally invested in the said plant, or upon the depreciated value of *397] the same, *estimated at the time the rates were made, or at any other time; or how otherwise a deduction, if any, should be made in respect of the last mentioned plant, or in respect of any part thereof.

Thirdly. Whether the appellants were entitled to a further deduction for interest and tenant's profits, or either, upon the said floating capital.

Fourthly. Whether the deductions to be allowed in respect of the stations, buildings, and sidings, along the line of railway, ought to be ascertained by taking the rateable value at which the same were assessed to the relief of the poor, or by allowing 6*l.* per cent. upon the original cost of construction, as contended for by the appellants; or how otherwise a deduction should be made in respect of the said stations, buildings, and sidings.

And it was agreed that, upon the decision of the Court being given on the said several questions, the proper amount of assessment to the said rates should (if necessary) be ascertained and settled in conformity with such decision, by agreement between the parties or by an accountant to be appointed by the attorneys on both sides; and the rate amended accordingly. And it was further agreed that judgment confirming, or (if necessary) amending the said rates, in conformity with such decision, and for such costs as the Court should direct, should be entered on motion by either party, at the Sessions for the said county next or next but one after such decision should have been given.

Lush, for the respondents.(a)—First: the percentage amount to be allowed the appellants for interest on *capital and tenant's [*398 profits is to be calculated upon the depreciated value of the rolling stock, as estimated at the time when the rates were made; and not upon the capital invested in the rolling stock taken at its cost price. This point has already been decided by the Court, in *Regina v. Great Western Railway Company*, 6 Q. B. 179 (E. C. L. R. vol. 51). The percentage is to be allowed upon the value which a hypothetical tenant, taking the line at the time the rates were made, would have had to give for the rolling stock; and it is clear that he would then have given no more than the depreciation price. In order to have entitled themselves to an allowance on the cost price, it was incumbent on the appellants to keep the value of the rolling stock up to that price; and they have not done so. Secondly: The appellants are not entitled to any deduction for interest on capital and tenant's profits upon the additional amount of capital invested in turn-tables, cranes, and such of the other articles specified in the case as are fixtures; though it may be conceded that a deduction must be allowed in respect of the office and station furniture, which are mere movable chattels. With that exception the articles specified are fixtures attached to the freehold, and, though easily removable without injury to the freehold, intended to remain permanently connected with it, and essential to the working of the line; and *Regina v. Southampton Dock Company*, 14 Q. B. 587 (E. C. L. R. vol. 68), is expressly in point to show that no deduction can be claimed in respect of them. Real property to which machinery is attached for business purposes, ought to be assessed according to its actual value as combined with the machinery, without considering whether the [*399 *machinery be real or personal property: *Regina v. Guest*, 7 A. & E. 951 (E. C. L. R. vol. 34). Thirdly: the appellants are not entitled to a further deduction for interest and tenant's profits, or either, upon the floating capital. In addition to every possible item of expenditure which they can endeavour to insist upon as deductions from their profits, they say that the necessity for keeping this floating capital unemployed operates in effect as a further deduction. It does not appear, however, that they have thus to reserve any sum in excess of their daily receipts. [HILL, J.—The case finds that they are obliged to give large credit to some of their customers for various, and possibly considerable periods.] The hypothetical tenant would be obliged to put by money to provide for his rent; and he would not be entitled to any deduction from rateability in respect of such money. [BLACKBURN, J.—More than ordinary delay in realizing the profits would be a ground on which the tenant might insist for an abatement of the rent. COCKBURN, C. J.—The delay would diminish the profits pro tanto.] Fourthly: The deduction to be allowed in respect of the stations, buildings, and sidings along the line of railway ought to be ascertained by taking the proper rateable value of the land occupied by them, as enhanced by their construction. The rateable value at which the stations, &c., ought to be assessed, rather than that at which they are actually assessed (one alternative suggested in the case), is the true standard of rateability. That the

value ought not to be estimated according to their original cost and interest thereon (the other suggested alternative), is shown by *Regina v. Great Western Railway Company*, 6 Q. B. 179 (E. C. L. R. vol. 51). (The case was then adjourned.)

*400] *Scotland*, for the appellants.(a)—As to the first point, whether the percentage amount to be allowed for interest on capital and tenant's profits is to be calculated upon the depreciated value of the rolling stock at the time the rates were made, or upon its value at cost price; no doubt the calculation ought not to be made upon the cost price if it can be shown that, owing to a fall in the price of labour or materials, the stock could now be purchased at a lower rate. That, however, is not a fact found in the case; from which it merely appears that the appellants keep back a certain sum annually, intended for the ultimate renewal of the rolling stock. This sum ought not to be deducted from the cost price, before making the calculation of tenant's profits upon it; for when the time comes for the renewal of the stock it saves an expenditure equal to the whole of the cost price. [BLACKBURN, J.—When the stock requires renewal it is still worth a considerable sum. The renewal might be effected by the addition annually of new stock in small quantities.] In calculating his profits the hypothetical tenant would be entitled to deduct the sum annually laid by for the purposes of the renewal, as being part of the necessary expenditure upon the working of the line. [HILL, J.—No doubt the appellants would be entitled to this deduction if they had annually kept the rolling stock up to its original value; but, as they have not done so, we must overrule *Regina v. Great Western Railway Company*, 6 Q. B. 179 (E. C. L. R. vol. 51), if we decide this point in your favour.] In *Regina v. London, Brighton, and South Coast Railway Company*, 15 Q. B. 313 (E. C. L. R. vol. 69), it was held that a railway Company is entitled to a deduction from the rateable value in order to

*401] countervail the depreciation which takes place in the value of the permanent way, and to maintain it in a state to command the proposed rent which is the measure of the assessment: and that the Company is not disentitled to such deduction because it has not incurred the expense, nor laid by from its receipts any sum to meet it when it should arise; although the Company ought to set apart the sum which it claims to deduct, and, whenever the time comes for actually making the restoration, will be estopped from claiming more than that deduction. The accumulation of funds for the purpose of the renewal of the rolling stock is clearly a charge upon the occupation of the line, regarded as a railway; for without it the Company could not continue to carry on business. As to the second point, it is admitted by the other side that the appellants are entitled to a deduction in respect of the additional capital invested in furniture and other things which are not fixtures; but it is said that they are not so entitled in respect of capital invested in fixtures. The test of rateability in this respect, however, is not simply whether fixed machinery is or is not a fixture, but, further, whether or not it would be provided by a landlord for the hypothetical tenant, and would be ancillary to the occupation of the hereditament by the latter for the purpose of carry-

ing on a business; whether or not, in short, it would be a landlord's fixture: *Regina v. Haslam*, 17 Q. B. 220 (E. C. L. R. vol. 79). If such machinery would not be a landlord's fixture, the deduction ought to be allowed in respect of it. Now, many of the things specified in the case would not be provided by the appellants for the supposed tenant, who would have to find them himself. Lathes are an *instance. [HILL, J.—The turntables, at all events, are part of [402 the actual permanent way.] The question as regards turntables equally with the other fixed machinery is, whether the value of the railway to a tenant is or is not increased by them. If it is the appellants are rateable in respect of them: *Rex v. Birmingham and Staffordshire Gas Light Company*, 6 A. & E. 684 (E. C. L. R. vol. 83). If it is not, and the tenant would have to find the machinery himself (an assumption not inconsistent with any fact found in the case), the value of the machinery ought to be regarded as a deduction from tenant's profits. [BLACKBURN, J.—The question rather is, what machinery would pass with the line if it were let?] That is the same question under another aspect. As to the third point: The appellants are entitled to a further deduction for interest and tenant's profits upon the floating capital. They are compelled always to have in hand a certain sum of money in lieu of the returns, which take time to realize. The ready money takings being insufficient to meet the outgoings, there is a constant necessity, from one year to another, that this floating capital should be at command. A tenant would have to take this into consideration in taking the property. [BLACKBURN, J.—Probably the appellants are entitled to a deduction in respect of the interest on the floating capital; but can they claim any further allowance? That is a sub-division of the question. It must be remembered that the principle is necessarily employed for the very purpose of realizing the returns upon which the appellants are rated; that it is essential to the carrying on of their business, and contributes, so to speak, to the earnings of the line. The *appellants are [403 therefore entitled to a deduction for tenant's profits, also, upon it. There is no distinction in principle between the floating capital and the capital invested in the locomotive stock, or in any other branch of the concern. [BLACKBURN, J.—There is this distinction, that money invested in stock cannot be easily realized, and the realization may occasion loss; whereas money lying at a bank is realized already.] The two classes of capital may be at different risks, which may affect their respective arithmetical amounts; but in principle they are both employed in the same way upon the business. A similar allowance to that claimed by the appellants under the present head was made to the water Company in *Regina v. Mile End Old Town*, 10 Q. B. 208 (E. C. L. R. vol. 59), and passed without objection. As to the fourth point: The deduction to which the appellants are entitled in respect of stations, buildings, and sidings ought to be ascertained by allowing 6l per cent. on the cost of their original construction. The other side admit that this deduction should be on the footing of the proper rateable value of the stations, &c.: and their cost price, plus 6l per cent. upon it, is their proper rateable value, in the absence of proof that they could now be built cheaper.

Lush was heard in reply.

Cur. adv. vult.

COCKBURN, C. J., now delivered the judgment of the Court.(a)—Four questions are propounded in this case for the decision of the Court. The first is, whether the percentage amount to be allowed *404] for interest on capital *and tenants' profits is to be calculated upon the cost price of the rolling stock, or on the depreciated value which that stock may bear at the time the rate is actually made. We are of opinion that the allowance must be made with reference to the actual and not to the original value. This point has already been decided by this Court in the case of *Regina v. Great Western Railway Company*, 6 Q. B. 179 (E. C. L. R. vol. 51), in which decision we entirely concur. In addition to the reasons given in the judgment of the Court in that case it may be observed that, as, under The Parochial Assessment Act, the tenant's profits upon stock must necessarily be calculated with a view to their deduction from the gross earnings, in order to ascertain what a tenant would give for the entire property, nothing could be more inconvenient than that a different principle should prevail in calculating the profits in the two cases. Now the question, when considered under The Parochial Assessment Act, must be looked at, not with reference to the railway Company, who may have expended on the purchase of the stock a much larger sum than such stock would now realize, but with reference to an incoming tenant and the amount of capital which such tenant would have to lay out in the purchase of the rolling stock necessary to carry on the undertaking. It is obvious that what it would be worth the while of a person or Company about to embark in a commercial undertaking to give as rent for the premises in which it was to be carried on, would depend on the amount to be deducted, in addition to repairs and other necessary outgoings, from the gross earnings, in respect of *405] the profits due to the capital to be employed in the concern. *But it is plain that a tenant would calculate such profits on the amount of capital actually required to be expended on the stock; not on what may have been the value of such stock at some other time or in other hands. Now it must be assumed that the stock, in its existing condition, is sufficiently effective to produce the earnings which, after the necessary deductions, constitute the improved value of the railway; and it cannot reasonably be supposed that, if the Company were about to give up the undertaking, they would not be willing to part with their stock at its actual value; or that, if they refused to do so, the incoming tenant could not procure other stock of an equally efficient character, at its real value, to supply the deficiency. In estimating therefore, under stat. 6 & 7 W. 4, c. 96, what a tenant would pay, the profits must be calculated on the actual value of the stock. It cannot be supposed that, in exempting profits under stat. 6 & 7 Vict. c. 48, a different principle of calculation was intended to be acted on.

The second question is, whether the company are entitled to a deduction in respect of various articles therein specified, being things necessary for carrying on the business of the Company. The articles to which such a question may have reference may be divided into three classes. First, things movable, such as office and station furniture; Secondly, things so attached to the freehold as to become part

(a) Cockburn, C. J., Hill and Blackburn, Js.

of it; and, Thirdly, things which, though capable of being removed, are yet so far attached as that it is intended that they shall remain permanently connected with the railway or the premises used with it, and remain permanent appendages to it as essential to its working. It is clear that, in respect of the first class of articles, a deduction should be allowed. *It is equally clear that no deduction should be allowed as to the second. As to the third, the question is [*406 finally settled by the decision of this Court in the case of *Regina v. Southampton Dock Company*, 14 Q. B. 587 (E. C. L. R. vol. 68).

The third question, whether the Company are entitled to a deduction in respect of the floating capital therein referred to, is one of considerable nicety, and which, as it appears to us, must depend on whether, on the whole capital employed, a greater delay occurs in realizing the returns than is ordinarily incidental to the employment of capital. No doubt as the rent which the imaginary tenant, contemplated by The Parochial Assessment Act, could afford to pay, would be the difference between the gross earnings (after the necessary deductions) and the amount of profits due (reference being had to the nature of the undertaking) on the capital employed; whatever tends to diminish such profits must go, pro tanto, to diminish the rent. Any delay in realizing the profits, beyond such as is generally incidental to the ordinary employment of capital, may therefore (as it must be presumed that it would be taken into account by the tenant) be fairly taken into account in determining the rateable value. On the other hand, it must be observed that, as a very large proportion of the earnings of a railway company is of a ready money character, it may well be that, when the whole of the capital and of the earnings are taken into account, the profits on the whole capital may be realized in a shorter time in this species of undertaking than on the average of commercial enterprises. If this should be the case, the delay in realizing that profit which might arise *as to a part of the capital might well be considered to be compensated by the [*407 more than ordinary quickness of the return on the rest. We have no means before us of determining the question with reference to this view of the case. We can do no more than point out the principle by which we think it must be determined.

As regards the fourth question, we are of opinion that the deduction to be allowed in respect of stations, buildings, and sidings must be calculated on the actual value at which they are to be assessed, and not on the original cost of construction.

Rates to be amended, if necessary, on the principles laid down in the judgment.

CASES

ARGUED AND DETERMINED

IN

Michaelmas Vacation,

XXIV. VICTORIA. 1860.

The Judges of the Court of Queen's Bench who sat in Banc in this Vacation, were:

	COOKBURN, C. J.	
WIGHTMAN, J.		HILL, J.
CRUMPTON, J.		BLACKBURN, J.

WRIGHT v. WILKIN. Nov. 27.

[Reported, in the Queen's Bench and in the Exchequer Chamber on error from that Court, 2 B. & S. 232 (E. C. L. R. vol. 110).]

*409] *IN THE EXCHEQUER CHAMBER. (a)

(Error from the Queen's Bench.)

The Company of Proprietors of the STOURBRIDGE Navigation v. The Earl of DUDLEY. Nov. 27.

A canal Act, 16 G. 3, c. xxviii., provided that no owner of any mines should carry on any work for the getting of coal or minerals, within the distance of twelve yards from the canal, nor should any coals or other minerals be got under any part of the canal, or the towing-paths thereunto belonging, or under any reservoir to be made by the canal Company, or within or under any land or ground lying within the distance of twelve yards of either side of the canal, or of any reservoir, except as thereafter mentioned, without the consent of the Company.

By another clause it was provided, that when the owner of any coal-mine, &c., lying under the canal or reservoirs, or within the distance thereinbefore limited, should be desirous of working the same, then such owner should give a written notice of his intention to the Company three calendar months before he should begin to work such mines lying as

(a) Before Willes, Byles and Keating, Js., Martin, Channell and Wilde, Bs.

aforesaid; and upon the receipt of such notice it should be lawful for the Company to inspect such mines, in order to determine what coal or other minerals might be come at and be actually gotten; and if the Company should neglect to inspect such mines within thirty days after the receipt of such notice, it should be lawful for the proprietors of such mines, and they were thereby authorized, to work such part of the said mines as lay under the canal or reservoirs, or within the distance aforesaid: and if upon inspection the Company should refuse to permit the owners of the said mines to work such part of the said mines lying as aforesaid, or any part thereof, as they might have come at and actually gotten, then the Company should, within three calendar months, pay to the owners the value thereof.

By another clause it was provided, that nothing in the Act contained should defeat, prejudice, or affect the right of any owner of lands or grounds in, upon, or through which the canal, &c., should be made, to the mines lying within or under the lands or grounds to be set out and made use of for such canal, &c.; but all such mines were thereby reserved to such owners respectively; and it was declared that it should be lawful for such owners, subject to the conditions therein contained, to work all such mines: Provided that in working such mines no injury were done to the said navigation.

The owner of a coal-mine gave the statutory notice to the Company of his intention to work it under and within twelve yards' distance of one of the Company's reservoirs. The Company did not thereupon either inspect the mine, or refuse to permit it to be worked, or pay the owner the value of it.

Held that the mine owner, after the expiration of the time limited by the Act for the Company to take those steps, was entitled, notwithstanding the proviso to the last-mentioned clause, to work the mine under the reservoir in the usual and ordinary mode; and that no action lay against him by the Company for damage caused to the reservoir by reason of such working.

ERROR was brought by the plaintiffs, upon the judgment of the Queen's Bench given in favour of *the defendants(a) upon [*410 a case stated by consent and by order of Hill, J., which was in substance as follows.

The action was brought to recover damages for injury to a reservoir and dam of the plaintiffs by the mining operations of the defendant.

The plaintiffs were incorporated by stat. 16 G. 3, c. xxviii.(b) for the purpose of making and maintaining a canal from Stourbridge, in the county of Worcester, to Stourton, in the county of Stafford; and two collateral cuts therein mentioned. By this Act,(c) p. 737, they were required to make "satisfaction" "for all damages to be sustained by the owners or proprietors of such lands, tenements, or hereditaments, waters, watercourses, brooks, or rivers, respectively, as" should "be taken, used, removed, diverted, or prejudiced, in or by the execution of all or any of the powers of" the "Act." At p. 745, they were empowered to make reservoirs and other works, "doing no injury thereby to any mines lying under or near to such reservoirs" and other works, "and making recompense and amends to the owners *and proprietors of lands, in manner as" therein was "directed [*411 and provided, for any lands to be taken or used, or for any damage to be occasioned to any other lands by reason of the making of any such reservoirs" and other works. At p. 749 and following

(a) On Friday, 10th June, 1859. The case is not reported, the Court having given no reasons for their judgment, saying that the matter, being *res integra*, had better be decided at once by the Court of Exchequer Chamber.

(b) Local and personal, public. "For making and maintaining a navigable canal from or near the town of Stourbridge, in the county of Worcester, to join the Staffordshire and Worcestershire Canal, at or near Stourton, in the county of Stafford; and also two collateral cuts, one from a place called The Fens, upon Pensnet Chace, to communicate with the intended canal near the junction of Wordesley Brook with the river Stour; and the other from a place called Black Delph, upon the said chace, to join the first mentioned collateral cut at or near certain lands called The Lays, in the parish of Kingswinford, in the said county of Stafford."

(c) The Act not being divided into sections, it is necessary to refer to its paging.

pages certain persons were appointed Commissioners, "to determine and adjust" (p. 753) "from time to time, what distinct sum or sums of money" should "be paid by the" plaintiffs "for the absolute purchase of the lands or grounds which" should "be set out and ascertained" "for making the said canal, and collateral cuts, or any part thereof, and other the purposes in" the "Act mentioned; and also to determine and adjust what other distinct sum or sums of money" should "be paid by the" plaintiffs "as a recompense for any damages which" might or should "be, at any time or times whatsoever, sustained by" "persons" "being owners of, or interested in, any lands, grounds, tenements, hereditaments, and waters, for or by reason of the making, repairing, or maintaining, the said canal, or collateral cuts, or of any reservoirs," &c., inter alia, "by reason or means of the execution of any of the powers" therein contained, by the plaintiffs (p. 754). In case of dissatisfaction with the decision of these Commissioners juries were to be impannelled to decide the amount to be paid for purchase-money, damages, &c., by the plaintiffs; and their verdict was to be final (pp. 754 to 756). Upon payment or tender, by the plaintiffs to the owners, of the purchase-money for lands, when thus ascertained, the "lands" "and the fee simple and inheritance thereof," were "from thenceforth" to "be vested in, and become for ever the sole property of, the" plaintiffs, "to and for the use of the said navigation, but to or for no other use *or purpose whatsoever" *412] (p. 759). At p. 794 it was enacted that all coals and other minerals which should be found and dug up, in making, carrying on and completing the canal, collateral cuts, and other works authorized by the Act, might be taken, carried away, and disposed of, for their own use and benefit, by the persons respectively in whose land or grounds the same were found and dug up. And, at p. 795, "That no owner or proprietor of any mines or minerals, their workmen or servants, or other person whatsoever," should "on any account whatever, open, dig, sink, or carry on, any work for the getting of coal, limestone, ironstone, or mineral, within the distance of twelve yards from the said intended canal or collateral cuts as aforesaid; nor" should "any coals, or other minerals, be got under any part of the said canal or collateral cuts, or the towing paths thereunto belonging, or under any reservoir or reservoirs to be made by the" plaintiffs, "or within or under any land or ground lying within the distance of twelve yards of either side of the said canal or collateral cuts, or of any reservoir or reservoirs, on any account whatsoever, except as" thereafter "mentioned, without the consent of the" plaintiffs "in writing under their common seal for that purpose, first had and obtained. Provided nevertheless, that when any mine of coal, ironstone, or other mineral, which" should "be worked agreeably to the directions of" the "Act, or any vein thereof," should "extend beyond the limits" thereinbefore "allowed for working the same, it" should and might "be lawful for the owner of any such mine, without any such consent as aforesaid, from time to time, upon making sufficient and necessary headways or tunnels under the said canal and collateral cuts and towing paths, and also under any *413] *ground where such owners" were "restrained from working as aforesaid, to dig, make, and get, such coal, ironstone, or other minerals, beyond such limits; so as such headways or tunnels" did "not exceed six feet in height, nor four feet in breadth; and so

as the same" were "not made nearer together than nine feet; anything" therein "contained to the contrary" thereof "in any wise notwithstanding." The Act then (at p. 796) empowered the Company to enter lands and mines adjoining their works, for the purpose of discovering whether any mine was being worked contrary to the directions of the Act; and (if it should be discovered that such was the case) to do everything necessary for the safety and security of their works; the costs and expenses whereof were to be recoverable in the manner specified in the Act. It was then provided (p. 979), "That when and so often as the owner or proprietor of any coal-mine, limestone, or other minerals, lying under the said canal, or collateral cuts, or any such reservoir or reservoirs as aforesaid, or within the distance" thereinbefore "limited," should "be desirous of working the same, then, and in every such case, such owner or proprietor" should "give notice in writing, under his, her, or their hand or hands, of such his, her, or their intention, to the clerk for the time being of the" Company, "at least three calendar months before he, she, or they" should "begin to work such mines, lying under the said canal or collateral cuts, or the said reservoir or reservoirs, or within the distance aforesaid; and upon the receipt of such notice it" should and might "be lawful for the said Company" "to inspect, or cause such mines to be inspected, in order to determine what coal or other minerals" might "be come at, *and be actually gotten: and if the said Company" should "fail or neglect to inspect, or cause such mines [*414 to be inspected, within thirty days after the receipt of such notice, then it" should and might "be lawful for the owners or proprietors of such mines, and they" were thereby "respectively authorized to work and get such part of the said mines as" lay "under the said canal or collateral cuts, or the said reservoir or reservoirs, or within the distance aforesaid; and if, upon such inspection as aforesaid, the said Company" should "refuse to permit the owners or proprietors of the said mines to work such part of the said mines as" lay "under the said canal or collateral cuts, or the said reservoir or reservoirs, or within the distance aforesaid, or any part thereof, as they might, from time to time, have come at and actually gotten, or in any other manner obstruct or prevent them from getting the same; then the said Company" should, "within three calendar months after such refusal or obstruction as aforesaid, pay, or cause to be paid, to the owners, proprietors, or workers of such mines respectively, such price or prices for the same, in proportion to their several interests therein, as the next adjoining mines of equal quality" should "have been really and bonâ fide sold for, or be estimated or valued at:" which price, if disputed, was to be settled by the Commissioners or a jury. At p. 798 the owners of mines were authorized to work, carry on and drain the same, and to make cuts through their own lands to the canal or its collateral cuts; "so as no injury or damage be done thereby to the said navigation." At p. 816 it was provided "That nothing" in the Act "contained" should "extend, or be construed to extend, to defeat, prejudice, or affect the right of any lord *or lords of any [*415 manor or manors, common or waste grounds, or of any owner or owners of any lands or grounds in, upon, or through which the said canal and collateral cuts, towing paths, wharfs, quays, trenches,

sluices, passages, watercourses, or conveniences aforesaid, or any of them," should "be made, to the mines, minerals, or quarries, lying or being within or under the lands or grounds to be set out or made use of for such canal and collateral cuts, towing paths, wharfs, quays, or other conveniences aforesaid, or any of them; but all such mines, minerals, and quarries," were thereby "reserved to such lord or lords of such manor or manors, or of such common or waste grounds, and to such owner or owners of such lands or grounds respectively, their heirs or assigns; And that it" should and might "be lawful to and for the lord or lords of such manor or manors, common or waste grounds, or such owner or owners of such lands or grounds respectively (subject to the conditions and restrictions herein contained) to work all such mines and quarries, and to take and carry away all such coals, ironstone, and minerals, as" should "be gotten therein, to his and their own use; provided that in working such mines and quarries no injury be done to the said navigation; anything" in the Act "contained to the contrary notwithstanding."

Under the powers vested in them by this Act the plaintiffs made the canal and the collateral cuts, and also certain reservoirs for supplying them with water, on certain common or waste lands within the manor of Kingswinford, in the county of Stafford; under an agreement for the purchase of those lands, with the late Viscount Dudley *416] and Ward, who was then the lord of *that manor, and as such entitled to the soil of the lands in question, and the minerals under the same. By indenture, dated 16th January, 1784, made between the said Lord Dudley and Ward and the plaintiffs, after reciting that the former, in pursuance of stat. 16 G. 3, c. xxviii., had agreed to sell and convey to the Company, for the use of the said navigation, the parcels of land therein mentioned, his Lordship conveyed the same to the Company in fee; excepting and reserving to him and the persons entitled in remainder to the possession and inheritance of the said lands for the time being, and to his and their heirs and assigns respectively, all mines of coal, limestone, ironstone, and other minerals in and under the said lands or any part thereof: with liberty of working and getting the same in such manner as was directed and prescribed by the said Act of Parliament. This deed, which contained a covenant by Lord Dudley and Ward for quiet enjoyment, was to be deemed part of the case. In the same year, but after the execution of this conveyance, an enclosure Act was passed, for enclosing the common and waste lands in the manor of Kingswinford. The Commissioners appointed by this Act (which was also to be deemed part of the case, but to which it is unnecessary further to refer) allotted to the Company a piece of land, parcel of the manor; and the Company thereupon built, upon that piece of land, a dam to one of their before-mentioned reservoirs. The late Lord Dudley and Ward died in 1833, and thereupon the devisees in trust under his will became the lords of the manor of Kingswinford. In 1843, these trustees, who were then possessed of and working very extensive mineral property in *417] the neighbourhood, were desirous of *getting the coal under and within the distance of twelve yards of the said reservoir and the works thereof; and they accordingly, on 10th November, 1843, gave a written notice, under their hands, to the clerk of the

Company, of such desire, and of their intention to work the same, and to open, dig, sink, and carry on the necessary works and operations for that purpose. The Company did not, after the receipt of such notice, inspect or cause to be inspected the said mines; or refuse to permit the said trustees to work such part thereof as lay under the said reservoir and works, or within twelve yards thereof. The trustees, after giving the said notice, continued to work mines near to the said reservoir and dam, though not within twelve yards of them, until the year 1853; when the defendant, under the limitations of the will of the late Lord Dudley and Ward, became lord of the manor of Kingswinford, and owner of the mines mentioned in the notice. Subsequently to that time the defendant continued working the said mines; and, in the years 1853, 1854, and 1855, worked and got large quantities of coal, as well under and within twelve yards of the said reservoir and under and within twelve yards of the said dam thereof, as also beyond such distance of twelve yards respectively. The construction of the said reservoir and dam had increased the liability of the surface to damage from mining operations underneath, and the defendant, by working the said mines, caused damage to the said reservoir and dam. If the land where the said reservoir and dam were constructed had remained in its original state as a common, a portion of the surface would have been let in, and the grass growing thereon destroyed, by the defendant's mining operations. The quantity of grass so destroyed would, however, have been so small [*418] that sufficient grass would have been left for the commoners.

For the purposes of the case it was to be taken as admitted that the defendant worked the said mines in the usual and ordinary mode of working mines in the district; and was not guilty of any negligence in working them, save in working them without leaving sufficient support for the said reservoir and dam; if, upon the facts stated, the Company were entitled to have such support left in working the mines. The Court was to have power to draw all such inferences of fact as a jury might properly draw.

The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover for the injury done by the working of the said mines or any part thereof.

Manisty, for the plaintiffs.—The plaintiffs are entitled to recover. They had a right to the support of the land immediately underneath their reservoir, which was constructed on land purchased by them from the defendant's ancestor in 1784. By p. 737 of their Act, the plaintiffs were required to make satisfaction for all damages to be sustained by the owners of lands taken for or prejudiced by the execution of the powers of the Act. The deprivation of the right to work the mines, beneath the reservoir, in the direction of the surface, beyond the point which would leave sufficient support for the reservoir, was damage for which the defendant's ancestor was entitled to compensation under this provision, and for which it must now be assumed that he received compensation from the plaintiffs. At p. 795 there is an express prohibition upon the owners of mines or minerals, from *working and getting the same within or under any land or [*419] ground lying under, or within the distance of twelve yards from, any reservoir of the plaintiffs, without their written consent

under seal. At p. 798, the owners of mines are authorized to work them, but only "so as no injury or damage be done thereby to the said navigation." So, at p. 816, a similar power is given to the lords of manors and others, but only "provided that in working such mines and quarries no injury be done to the said navigation." The other side will rely on the power given, at p. 797, to the owners of mines lying under the canal or reservoirs, or within the distance of twelve yards of them, to work the same, after giving three months' written notice to the plaintiffs of their intention to do so; and provided the plaintiffs should not, within thirty days after the receipt of such notice, have the mines inspected and refuse to allow them to be worked. It will be contended for the defendant that, inasmuch as the required notice was given to the plaintiffs so far back as 1843, and they never caused the mines to be inspected, or refused to permit them to be worked, in which event they would have been obliged to pay compensation, they have no ground of complaint against the defendant for working them within the twelve yards' distance. Conceding, however, that the omission to inspect, on the part of the plaintiffs, gave the defendant the right to work the mines, such right was nevertheless subject to the obligation, imposed upon him by other parts of the statute, so to work them as to do no damage to the plaintiffs' property. In *Caledonian Railway Company v. Sprot*, 2 Macq. Sc. Ap. Ca. 449, the plaintiffs' railway had been made under the powers of an Act *420] which authorized them to take *lands for the purpose, and authorized the owners of lands taken to reserve the minerals under them, and to work such mines after giving security to the plaintiffs for all damages and injury which might result. It was held by the House of Lords that a conveyance of land to the plaintiffs for the purposes of the line, gave a right by implication to all reasonable subjacent and adjacent support connected with the subject-matter of the conveyance; and therefore that, although in the conveyance the minerals were reserved, the grantor was not entitled to work them, even under his own land, in any manner calculated to endanger the railway. [WILLES, J.—In *Fletcher v. Great Western Railway Company*, 4 H. & N. 242, 253, Martin, B., points out that that case turned upon the construction of the conveyance regulating the rights of the parties between themselves, independently of an Act of Parliament.] The conveyance in *Caledonian Railway Company v. Sprot*, 2 Macq. Sc. Ap. Ca. 449, had to be construed with reference to the Company's Act, no less than the conveyance in the present case. The statute now in question, moreover, clearly prohibits such a working of the mines, under lands which have been conveyed to the plaintiffs, as shall do injury to the navigation. *Dudley Canal Navigation Company v. Grazebrook*, 1 B. & Ad. 59 (E. C. L. R. vol. 20), is no doubt undistinguishable from the present case, and is a direct authority against the plaintiffs. That decision is, however, open to review in this Court, and cannot be supported. It proceeded upon the erroneous view of the law enunciated by Littledale, J., at p. 68 of the report, namely, that, if there had been no Act of Parliament in the case, and a man had sold the land to the Company, reserving all mines to himself, he *421] would have been entitled to *work the mines in the usual way, even if he had thereby caused damage to the Company. Ac-

ording to that view, the owner of surface soil is not entitled at common law to the support of the subjacent strata; a doctrine now exploded by the cases of *Humphries v. Brogden*, 12 Q. B. 739 (E. C. L. R. vol. 64), and *Caledonian Railway Company v. Sprot*, 2 Macq. Sc. Ap. Ca. 449. [MARTIN, B.—In delivering the judgment of the Court in *Dudley Canal Navigation Company v. Grazebrook*, 1 B. & Ad. 59, 68 (E. C. L. R. vol. 20), Bayley, J., says, "It is not necessary to give any opinion whether the defendants could have got their minerals in any manner that they pleased, without being liable to an action. The point for our decision is, whether they are responsible for the damage done to the plaintiffs, by working their own mines in the ordinary and usual mode." That is the same proposition which Littledale, J., had enunciated. It is no longer law that the owner of mines may work them in the ordinary and usual mode, even if he, in so doing, takes away the support to the surface. In the next place, even should the Court consider that the plaintiffs are not entitled to support for their works from the mines which are worked by the defendant within twelve yards of them, they are clearly entitled to such support from all such mines of the defendant as are worked beyond that distance and diminish such support. With respect to these latter mines the Act of Parliament does not apply, and the plaintiffs' common law right remains unprejudiced: *North Eastern Railway Company v. Elliott*. (a) [WILLES, J.—I do not find it stated in the case that the plaintiffs' works have sustained *any damage from the working of the defendant's mines beyond the twelve yards' [*422 distance.

(*Manisty* also contended that the notice of 1843, given to the plaintiffs by the late Lord Dudley's trustees, was invalid; and, further, that on the true construction of the Enclosure Act, the plaintiffs were entitled to the support of such of the defendant's mines as were worked under the dam constructed on land allotted to the plaintiffs under that Act. He ultimately, however, abandoned both these points.)

Sir Fitzroy Kelly, for the defendant.—In the first place, no question is raised by the case as to any damage arising to the plaintiffs' works from the working of the defendant's mines beyond the twelve yards' distance from them. [MARTIN, B.—You need not trouble yourself on that point, which is evidently a mere afterthought on the part of the plaintiffs.] The only remaining question, then, is, whether the case of *Dudley Canal Navigation Company v. Grazebrook*, 1 B. & Ad. 59, 68 (E. C. L. R. vol. 20), is or is not now to be overruled. That case is good law. The dictum in it of Littledale, J., on which stress has been laid by the other side, forms no part of the judgment, and refers to a question not raised by the case; namely, what would have been the rights of the parties at common law, apart from the plaintiffs' Act of Parliament. As in that case, so in the present, the rights of the parties depend, to adopt the language of the judgment, (b) "altogether on the construction of the Act of Parliament under which the plaintiffs made their canal. They have no rights except what were given by that Act; the" defendant "had the property in the soil and mines,

(a) Before Wood, V. C., 1 John. & Hem. 145. Affirmed on appeal, by Lord Campbell, L. C., 2 De G. F. & J. 423.

(b) 1 B. & Ad. 69 (E. C. L. R. vol. 20).

and all the rights of enjoying that property before the Act, and" he *423] "still" retains "all that the Act *has not taken away." The facts in both cases are similar, and the language of the respective Acts almost identical. The Court must give effect to the power to work the mines, even within the twelve yards' distance from the canal, given to the mine owner by p. 797 of the Act now under consideration. It is the plaintiffs' own fault, if they desired to prevent him from so doing, that they did not, on receipt of a notice in pursuance of that provision, take the course pointed out by the statute; by causing the mines to be inspected and paying a compensation for their refusal to let them be worked. The statute expressly empowers the owner to work the mines on the plaintiffs' failure to adopt that course; and imposes on the plaintiffs the obligation of purchasing the mines, if unwilling to allow them to be worked. The provisoes, at pp. 798 and 816, that the owners of mines are to do no injury or damage to the navigation in working the mines, cannot be treated as abrogating the express power given to the owners at p. 797, to work them within twelve yards of the canal, in the event of a failure by the plaintiffs to purchase them. Otherwise, the plaintiffs might always avoid the necessity of purchasing the mines, and, nevertheless, provided that injury was done to their property by the working, might bring an action for damages, or obtain an injunction in Chancery to prevent the working which they never had prohibited. In the judgment in *Dudley Canal Navigation Company v. Grazebrook*, 1 B. & Ad. 74 (E. C. L. R. vol. 20), it is said, with reference to a similar proviso in the Act there in question, requiring the owner of mines to do no injury, in working them, to the navigation? "If this proviso is to be construed literally, it is inconsistent with the sixty-second section; (a) for *424] if the *owner in working mines is to be responsible *at all* events for any injury or damage only to the canal, would the Company ever purchase the minerals from such owner? The provision as to the purchase would be nugatory. The only reasonable mode of reconciling these sections is, to say that the proviso" "is to be construed with some qualification, viz.; either that the party working the mines is to do no unnecessary damage or injury to the navigation, or no extraordinary damage or injury by working them out of the ordinary or usual mode. With this limitation all the parts of the Act are consistent with each other." The suggestion made by the other side, that the late Lord Ward must have been compensated for his interest in the mines when the plaintiffs bought the surface, is wholly unfounded. It was at that time uncertain whether the mines would ever be worked; and, in fact, notice of an intention to work them was not given by the vendor's representatives to the plaintiffs till fifty-seven years had elapsed from the purchase. Moreover, an assumption that the plaintiffs not only bought the surface, but at the same time made compensation for the mines and minerals beneath, would be opposed to the policy of the Legislature, which, in passing railway and canal Acts, exempts Companies from the obligation of purchasing, in the first instance, more than the surface, which alone they require; leaving the compensation to be paid for the support to the surface from underlying mines for future determination, when, if

(a) Which was, in substance, the same as p. 797 of stat. 16 G. 3, c. xxviii.

ever, the mine owner wishes to work them: *Fletcher v. Great Western Railway Company*, 4 H. & N. 242. *Caledonian Railway Company v. Sprot*, 2 Macq. Sc. Ap. Ca. 449, turned upon the effect, independently of any Parliamentary enactment, of the conveyance of the land to the Company, which was an ordinary common law *conveyance. [425 It appears from the report that the Act under which the Caledonian Railway was originally formed contained no clause empowering the Company to stop the workings of mines if they chose. *North Eastern Railway Company v. Elliott*, (a) was a case the circumstances in which were peculiar. It is, however, in favour of the defendant, so far as regards the working of the mines within twelve yards of the reservoir; and Wood, V. C., did not dispute the soundness of the decision in *Dudley Canal Navigation Company v. Grazebrook*, 1 B. & Ad. 59 (E. C. L. R. vol. 20), which he thought, having regard to the different language of the respective Acts involved there and in the case before him, was distinguishable. *Wyrley Canal Company v. Bradley*, 7 East 368, is another authority directly in point to show that the plaintiffs, not having pursued the course pointed out by the statute to prevent the defendant from working the mines, have now no cause of action against him.

Manisty, in reply.—The Act under consideration in *Wyrley Canal Company v. Bradley*, 7 East 368, as the reporter points out in note (a) to p. 371 of the report, did not contain a proviso restraining the mine owner from doing injury to the navigation in working the mines. At the same page Dauncey, arguendo, mentions a case of *Birmingham Canal Company v. Hawkesford*, tried before Lawrence, J., in which that Company, whose Act did contain such a proviso, obtained a verdict.

MARTIN, B.—We are all of opinion that the judgment of the Court of Queen's Bench must be affirmed. Mr. *Manisty, in the first instance, made three points. As to the first, he admitted that [426 *Dudley Canal Navigation Company v. Grazebrook*, 1 B. & Ad. 59, was a direct authority against the plaintiffs, and undistinguishable from the present case; and that, unless we now overruled that decision, we must give judgment against them. The second point, that no sufficient notice of intention to work the mines was given to the plaintiffs, he abandoned without argument. The third point, as to the plaintiffs' right of support for so much of their works as are constructed on land allotted to them under the Enclosure Act, failed on the facts; for it was not found that these works had not increased the weight on the strata of land below the surface. We come back then to the first point. And as to this, speaking for myself, I am of opinion that *Dudley Canal Navigation Company v. Grazebrook*, 1 B. & Ad. 59 (E. C. L. R. vol. 20), was rightly decided; and, had I now to consider the point for the first time, I should decide it in the same way. It seems to me that when, as in that case and in the present, there is a clause in an Act of Parliament empowering a mine owner to give notice to a Company, which has purchased the surface soil, of his intention to work the mines below; empowering the Company thereupon to have the mines inspected, and, if they choose, to prohibit the

(a) Before Wood, V. C., 1 John. & Hem. 145. Affirmed on appeal, by Lord Campbell, L. C., 2 De G. F. & J. 423.

"in the county of Middlesex," could not mislead any one.] Yes; the test is, whether the description would give sufficient information, or would mislead. In *Routh v. Roublot*, 1 E. & E. 850 (E. C. L. R. vol. 102), Lord Campbell, C. J. says, "I lay down no rule but this, that the affidavit required by the statute must give such information as reasonable persons would require." Reasonable persons, dealing with the firm of Godson & Hogben, could require no further information of their residence, than that it was in New Street, Blackfriars. There is but one place within the limits of the county of Middlesex, which answers that description. There is therefore nothing untrue in the description as it stands; as there was in the case of *Allen v. Thompson*, 1 H. & N. 15, where the assignor of a bill of sale was described merely as a "gentleman" by occupation, whereas he had a specific occupation, being a clerk in a public office. [*Raymond*, *contra*, mentioned *Collins v. Goodyer*, 2 B. & C. 563 (E. C. L. R. vol. 9).] In that case it *431] was held that 'Dorset Place, Clapham Road, *Middlesex,' was not a description of the true place of abode of a deponent, within the meaning of a rule of this Court, Mich. 15, Car. 2, the Dorset Place in question being in Surrey. There, however, the wrong county was mentioned; moreover, the requirements of the rule of Court were more stringent than those of stat. 17 & 18 Vict. c. 36, s. 1.

Raymond, *contra*.—The requirements of the statute have not been complied with: and unless they are strictly complied with, the statute makes the bill of sale void against the creditors of the assignors. Whether, therefore, or not, the inaccuracy of the description of the assignors' residence would mislead any one, the defendant, as execution-creditor, is entitled to insist on his right to the goods. [BLACKBURN, J.—The question is, what is meant, in the statute, by a description of the residence of an assignor. Must it not refer to a description such as an ordinary man would understand?] Even adopting that view, ordinary men living at a distance from London, would be misled by the description in the present case. [WIGHTMAN, J.—Not so, if they made any inquiry.] A creditor is not bound to make any inquiry. The description "New Street, Blackfriars," is *per se* insufficient. There may be, and probably are, many other places in England called Blackfriars, besides that in the city of London. And an insufficient description cannot be cured by the addition of an inaccuracy. That which is incorrect cannot be said to explain. *Collins v. Goodyer*, 2 B. & C. 563 (E. C. L. R. vol. 9), is precisely in point for the defendant. No one could have been misled there, for *432] there is but one *Clapham Road, yet the Court held that the addition "Surrey" made the description untrue. The rule of Court there under consideration required the true place of abode of a deponent to be inserted in an affidavit. So, by a description of the residence, in stat. 17 & 18 Vict. c. 36, s. 1, must be meant a true description of the residence. If a false description of the residence is given, the statute is not satisfied; and it is no answer to the objection grounded on the statute, that the description is equivalent to a true one and cannot mislead. Otherwise, the protection given by the Legislature to creditors might in numerous cases be frittered away. That the Act must be strictly complied with is well laid down by *Watson, B.*, in giving judgment in *Pickard v. Bretz*, 5 H. & N. 9

where he says, "Three things are to be stated in the affidavit, first, the time the bill of sale was made or given; secondly, the residence; and, thirdly, the occupation of the party making or giving it. The Legislature having passed an Act requiring these three things to be done for the prevention of fraud, it is not for the Courts to say that any one of them is immaterial. I can well understand why the Legislature should require a description of the occupation." I agree "that, provided the affidavit shows the occupation by reference to the bill of sale, that would be sufficient. But this affidavit does not; it neither states what the occupation is, nor whether the occupation mentioned in the bill of sale is correct. We should fritter away the Act by saying that this need not be done, when the statute requires it." [BLACKBURN, J.—Those observations would be in point if, in the present case, there had been no description of the place of residence of the assignors.]

**Horace Lloyd*, in reply.—The protection to creditors contemplated by the statute is sufficiently afforded, if the affidavit [*483 satisfies the rule laid down by Lord Campbell, C. J., in *Routh v. Roublot*, 1 E. & E. 850 (E. C. L. R. vol. 102).

(COCKBURN, C. J., was absent.)

WIGHTMAN, J.—I am of opinion that there is a sufficient description in the affidavit, of the place represented as being the place of residence of the persons making the bill of sale, to satisfy the statute. The Act recites that frauds are frequently committed upon creditors by secret bills of sale of personal chattels. The object of the Legislature therefore was to afford creditors facilities for discovering whether any of the persons with whom they deal has made a bill of sale: and, in order to effect this object, it requires such a description of the residence and occupation of the person making or giving such a bill to be filed as shall enable that person's creditors to identify him and take precautions accordingly. Was, then, such a description filed in the present case? The two persons making this bill of sale carried on the trade of printers in partnership, and may, no doubt, be said to have resided in New Street, Blackfriars. It has been settled by previous decisions that a person may be said to reside at the place where he is to be found daily, although he sleeps elsewhere. The question is, whether the description of the residence itself is sufficient. It is described as New Street, Blackfriars, in the county of Middlesex, whereas there is no such street in that county, but there is in the city of London. Now all the *creditors of these particular persons [*434 would be likely to know in what New Street, Blackfriars, they carried on business; and consequently, I think, and upon this I mainly found my decision, that New Street, Blackfriars, without more, would have been a sufficient description. To this description, however, an addition, untrue in fact, has been appended; namely, "in the county of Middlesex." But could any creditor be thereby misled? If not, we may disregard it. And I think that it could mislead no one. It is true that in *Collins v. Goodyer*, 2 B. & C. 563 (E. C. L. R. vol. 9), this Court held that the addition of a wrong county to the description of the place of abode of a deponent, in an affidavit to hold to bail, vitiated the description. That may have been a right decision, having regard to the wording of the rule of Court involved; the fact

that personal liberty was in question may also, perhaps, have influenced the Court. It was given, however, many years ago; and, without expressing an opinion upon it, we need only say that the present is not a case in *pari materia*.

HILL, J.—I am of the same opinion. I agree with my brother Wightman that in order to gather the intention of the Legislature we must look at the recital in the statute. Now the recital is, that "Frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances and possessed of property, and the grantees or holders of such bills of sale have the power of taking the property of such persons, to the exclusion of the rest of *435] *their creditors." The object, therefore, was to protect creditors; not those, only, to whom money might be owing from the assignor at the time of giving the bill of sale, but those, also, to whom he might afterwards, in the course of business, become indebted. To effect this object the Act proceeds to enact that every bill of sale, together with an affidavit of the time of its being given, and a description of the residence and occupation of the person making the same, shall be filed within twenty-one days after the making; and the question before us is, whether in the present instance the description of the residence and occupation of Godson and Hogden, the persons making the bill of sale, was sufficient under the Act. They are described as residing at New Street, Blackfriars, in the county of Middlesex, and as printers and copartners. The description of their occupation is correct; but New Street, Blackfriars, where they carry on business, is not in the county of Middlesex, but in the city of London. Now I take it that if the words "in the county of Middlesex" had been omitted from the description, no one who had dealings with the firm of Godson and Hogben could have doubted for a moment, on looking at the register of bills of sale, that they were the parties intended to be described. The question then arises whether the addition of the words "in the county of Middlesex" vitiates the description. I think that it does not, and that the maxim "*falsa demonstratio non nocet*" applies. A subsequent erroneous addition to the description of something already described with sufficient accuracy, does not affect its validity. We should be carrying the requirements of the Act further than the Legislature intended, were we to hold this description insufficient.

*436] *BLACKBURN, J.—I am of the same opinion. The object of the Act was to protect the present and future creditors of persons giving bills of sale of personal chattels, and to prevent such creditors from being deceived by the false appearance of the possession by one man of property which had been assigned to another. This object is carried out by the requirement that a bill of sale shall, within a specified time from its execution, be registered, together with, *inter alia*, a description of the residence and occupation of the person or persons by whom it was made. I do not find that any necessity exists for mentioning the county or vill in which that residence is situated; all that is required is that the description shall be such as to convey to creditors dealing with the maker of the bill of sale, a reasonable knowledge of the identity of their debtor with that

person. I think, therefore, that New Street, Blackfriars, would, *per se*, have been a sufficient description of the residence of the persons giving the bill of sale now in question. If so, does the erroneous addition, "in the county of Middlesex," vitiate the description? I agree with my brother Hill that it does not, and that the maxim "*falsa demonstratio non nocet*" applies; as he has stated in almost the same terms as those used by Parke, B., in *Llewellyn v. Earl of Jersey*, 11 M. & W. 183, 189, who there says, "As soon as there is an adequate and sufficient definition, with convenient certainty, of what is intended to pass by a deed, any subsequent erroneous addition will not vitiate it, according to the maxim '*falsa demonstratio non nocet*.'" Perhaps if the addition had been "in the county of York," or if the name of some other distant county had been inserted, it might possibly have misled creditors, and so have vitiated the description. But when we remember that the county of Middlesex abuts closely upon the city of London and, indeed, upon New Street, Blackfriars, it is impossible to suppose that any creditor of the assignors can have failed to know what New Street, Blackfriars, was meant. The other point, whether or not a man's place of business, at which he does not sleep, can be deemed to be his residence, has been already decided in the affirmative by previous cases.

Judgment for the plaintiff.

THE QUEEN, on the prosecution of the Churchwardens and Overseers of the parish of GATESHEAD, Appellants, v. The Inhabitants of ELSWICK, Respondents.(a) Nov. 21.

C. rented and occupied the ground floor of a house, consisting of a shop and two small rooms. Access to the shop and the rooms was gained by room doors opening out of a passage. This passage led through the house from the street in front to a yard at the back, and was closed by the house front door at one end and a back door at the other. K. rented and occupied the upper floor; access to which was gained by an outside staircase leading from the backyard. The bottom of this staircase was situated just outside the back door of the passage, and K. could gain it either from the rear of the house in the first instance, or by entering at the front door and passing through the passage to the rear. C. and K. each had a key of the front door, which door, and the passage, both of them used at pleasure, and they each kept clean a distinct half of the passage. Both front and back doors of the passage were kept closed at night.

Held, that the floor rented and occupied by C. was not "a separate and distinct dwelling house" within stat. 6 G. 4, c. 57, s. 2, and that, therefore, C. did not gain a settlement by renting it.

ON an appeal by the parish of Gateshead, in the county of Durham, to the Midsummer Quarter Sessions, 1860, for the town and county of Newcastle-upon-Tyne, against an order of justices for the removal of one Benjamin Coots from the township of Elswick, in the borough and township of Newcastle-upon-Tyne, to the said parish of Gateshead, the Sessions quashed the order, subject to the opinion of this Court on the following case.

The pauper, in the year 1851, rented the ground floor of a house in Blenheim Street, in the township of Westgate, in Newcastle-upon-Tyne, consisting of a shop and two small rooms; which, it was

(a) This case, decided in last Michaelmas Term, has been accidentally misplaced.

admitted by the respondents, was a good settlement by renting a tenement, provided the said tenement was a separate and distinct dwelling-house or building.

The house in question consisted of three floors. Each floor was let to separate tenants. There was a cellar floor let to one tenant, which it is not necessary to describe, as nothing turns upon it, further than that it had a distinct access of its own, and no communication with the rest of the premises. The ground floor, consisting of the rooms aforesaid, was let to the pauper, and was entered by a door from the street, which led into a passage which led through the house into a yard at the back, and was shut off from the street in front by a front door, and from the yard at the back by a back door. Out of this passage access was obtained to the shop and rooms occupied by the pauper by two panelled room doors, one of which led into the shop, and the other into one of the rooms behind; only one of which doors, being that leading into the shop, was used by the pauper, the other one having been kept locked and nailed during the whole of his occupation. The shop and rooms occupied by the pauper communicated internally with each other.

*489] The door into the shop was locked at night. The upper floor of the house, immediately above the premises occupied by the pauper, was, at the time of his occupation, let to one Kirkup, and was entered by an outside staircase leading out of the back yard; the bottom of the staircase being situate just outside the back door of the passage aforesaid, on the ground floor. Access could be obtained to the said staircase from the street at the back of the house, by going through the back yard, without going into the house at all. This entrance was for the separate and exclusive use of the occupier of the upper floor; but a person wishing to get to the said outside staircase from the street in front of the house, could come in at the front door, through the passage, past the doors leading into the shop and rooms of the pauper, and so out at the back door of the said passage, and up the staircase. Kirkup and his family, as tenants of the said upper floor, had the right of using the access to the said staircase by the front door; which, as well as the back door, was always shut at night, but kept open during the day time; and he, as well as the pauper, had a key of the front door, and the said front door was used by both, as occasion required. The passage, also, was used by both the pauper and his family, and Kirkup and his family, and was cleaned by them both; the pauper cleaning one-half of the said passage, from the front towards the back, to a point beyond the two doors aforesaid, whilst Kirkup cleaned the remaining half. There were no means of closing the said passage from the street on the one side and the back yard on the other, except by the front and back doors aforesaid.

It was contended by the respondents that the pauper did not gain a settlement in the said township of *Westgate, inasmuch as the *440] said tenement did not consist of a separate or distinct dwelling-house or building.

The question for the opinion of the Court was, Did the pauper gain a settlement by renting a tenement in Westgate? If the Court should be of opinion that he did, the order of Sessions was to be con-

firmed. If the Court should be of opinion that he did not, the order of Sessions was to be quashed, and the order of removal confirmed. (a)

Davison, in support of the order of Sessions.—The pauper gained a settlement by renting a tenement in Westgate. The question is, whether the ground floor rented by him was a "tenement" consisting "of a separate and distinct dwelling-house or building," within the meaning of stat. 6 G. 4, c. 57, s. 2; and the facts set out in the case show that it was. The entire house was let in three separate floors; each of which had a separate and distinct entrance peculiar to itself. The other side will probably rely on the circumstance that Kirkup, the tenant of the upper floor, had a right of way through the passage which led to the tenement rented by the pauper. That, however, did not prevent the ground floor, which was occupied exclusively by the pauper, from being a separate and distinct dwelling-house within the statute. *Rex v. Great and Little Usworth and North Biddick*, 5 A. & E. 261 (E. C. L. R. vol. 81), is a direct authority to that effect. In that case, two outer doors and some steps, which *gave access [441 to the middle floor of a house, were appropriated to the tenant of that floor exclusively. A separate flight of steps on the outside of the house led, by a different outer door, to a passage on the middle floor, from which passage another tenant, occupying the upper floor, reached his premises by a staircase of his own. One of the rooms belonging to the middle floor opened into this passage; and the tenant of that floor could not reach that room but by going up the last mentioned steps and along the passage, or by crossing the passage from his other rooms, by a door in one of them, which was usually locked. All these rooms communicated with each other and with both the doors appropriated to the tenant of the middle floor. This Court held that that floor was a separate and distinct dwelling-house, within the statute. The facts in the present case are almost identical. [HILL, J.—There is this distinction; that in that case the tenant had the exclusive use of a separate and distinct entrance to the floor occupied by him. Not so the pauper in the present case.] The point substantially decided in *Rex v. Great and Little Usworth and North Biddick*, 5 A. & E. 261 (E. C. L. R. vol. 81), was that the common use of a passage by the tenants of two separate parts of a dwelling-house would not prevent the part occupied by one of them from being a separate and distinct dwelling-house. [HILL, J.—In *Rex v. Wootton*, 1 A. & E. 232, 236, Patteson, J., says: "I have always thought that the words 'a separate and distinct dwelling-house or building,' in these statutes, meant, separate and distinct as to any other person: that the tenant should not hold part of a house." COCKBURN, C. J.—In *Rex v. Great and Little Usworth and North Biddick*, the middle floor, without the one *room to which access could be gained only by the passage used [442 in common by the two tenants, constituted a separate and distinct dwelling-house. BLACKBURN, J.—In *Monks v. Dykes*, 4 M. & W. 567, it was held that a lodger, occupying one room in a house, the key of the outer door being kept by the landlord, could not justify, as being in possession of a dwelling-house, turning out one who dis-

(a) The opinion of the Court was also asked upon facts relied upon by the respondents as establishing that the pauper had gained a settlement by apprenticeship in Gateshead. It is not, however, thought necessary to report the case as to this point.

turbed him in his possession. So, here, Kirkup, as well as the pauper, having a key of the front door, and each of them keeping clean the passage which they used in common, how can it be said that there was any separate and distinct dwelling-house in the possession of the pauper? The entrance from the passage into the shop and other rooms in the pauper's occupation was exclusively appropriated to him. *Rex v. Henley upon Thames*, 6 A. & E. 294 (E. C. L. R. vol. 33), may be relied upon by the other side; and is apparently in their favour. But the Court there gave no reasons for their decision; and *Rex v. Great and Little Usworth and North Biddick*, 5 A. & E. 261 (E. C. L. R. vol. 31), was not cited.

(*A. Liddell*, *contra*, was not called upon.)

COCKBURN, C. J.—We are all agreed that there was in this case no such renting of a tenement by the pauper as would confer a settlement under stat. 6 G. 4, c. 57, s. 2. The case which Mr. Davison has cited shows that a house may be so divided and apportioned between several tenants, each having a separate entrance to his portion, as practically to become several houses; by renting each of which, respectively, a settlement may be gained: provided that the severance of each portion is made complete by the appropriation to the tenant of it *443] *of an exclusive entrance, to the use of which other persons are not entitled. But, in the present case, no such exclusive entrance was appropriated to the pauper; the entrance by the front door of the house being used, in common with him, by another tenant. The case, therefore, does not fall within the principle of the decision upon which Mr. Davison relies.

WIGHTMAN, J.—I am of the same opinion.

HILL, J.—I am of the same opinion. I have already read the dictum of Patteson, J., in *Rex v. Wootton*, 1 A. & E. 232, 236 (E. C. L. R. vol. 28). The judgment of Littledale, J., in *Rex v. Great and Little Usworth and North Biddick*, 5 A. & E. 261 (E. C. L. R. vol. 31), proceeds on the same principle. He says: "There were in this house three floors, and the access to each was by separate outer doors; I think therefore that each was" "a separate and distinct dwelling-house within the statute." In the present case, the access to the floor occupied by the pauper was not by a separate outer door.

BLACKBURN, J.—I am of the same opinion. The test whether a part of a house is to be deemed a separate and distinct dwelling-house, appears to be whether it has a separate and distinct outer door; and the floor occupied by the pauper did not satisfy that test.

Order of Sessions quashed.

*444] *LOOME, Appellant, v. BAILY, Respondent. Nov. 28.

Stat. 1 & 2 W. 4, c. 32, s. 4, imposes a penalty upon any licensed dealer in game who buys, sells, or knowingly has in his possession or control, any bird of game after the expiration of ten days from the respective days in each year on which it shall become unlawful to kill or take such birds of game respectively; and upon any person not licensed to deal in game, who buys or sells any bird of game after the expiration of the same period, or who knowingly has in his possession or control any bird of game (except birds of game kept in a mew or breeding place) after the expiration of forty days from the respective days on which the season for lawfully killing such birds ends.

Held, that throughout this section the words "birds of game" include live birds; and

that a licensed dealer in game incurs the penalty by selling such birds after the expiration of the ten days specified by the statute.

CASE stated by a Metropolitan police magistrate, under stat. 20 & 21 Vict. c. 48.

John Baily, the respondent, of 118, Mount Street, Grosvenor Square, in the county of Middlesex, was summoned by the appellant, for that he, on 29th March, 1860, being then and there licensed to deal in game, according to stat. 1 & 2 W. 4, c. 32, s. 19, did then and there unlawfully sell certain birds of game, to wit, three pheasants, on the day last aforesaid, such day being after the expiration of ten days from 1st February, 1860; contrary to the 4th section of the said statute; whereby he had forfeited a sum not exceeding 3*l*.

The witness in the case stated that he called, on 26th March, 1860, at the shop of the respondent, who was then licensed to deal in game under the 19th section of the said Act; and asked to purchase some live pheasants; that the respondent asked the witness if he required wild pheasants, and, upon his replying "yes," the respondent said he should have to send to Norfolk for them, and the witness must call again on the Thursday following, 29th March. The witness went to the shop on the 29th, and again saw the respondent, who gave him the three pheasants, which he said were wild; and *thereupon [*445 the witness paid the respondent 2*l*. 5*s*., taking away the birds.

Upon these facts, the counsel for the respondent submitted that the 4th section, under which the respondent was summoned, did not apply to live birds of game, but had in view only birds of game which were dead. He cited *Porritt v. Baker*, 10 Exch. 759, and *Woolrych on the Game Laws*, p. 72. Yielding to the authority of that case the magistrate dismissed the summons.

Hawkins, for the appellant, in support of the summons.—The magistrate was wrong in dismissing the summons. Sect. 4 of the Game Act, 1 & 2 W. 4, c. 32, makes it an offence for persons to buy, sell, or knowingly have in their possession, after the expiration of the specified periods, any bird of game, whether it be alive or dead. Sect. 2 defines "game" as including "hares, pheasants, partridges," &c.; nothing being added as to whether live or dead animals are intended. Sect. 3 shows that live game were meant to be included. It fixes the days and seasons during which game may not be killed; the season, so far as regards pheasants, being between 1st February and 1st October. Sect. 17 empowers persons who have taken out game certificates, to sell game to any person licensed to deal in game, under sect. 18; and by sect. 19 any such last-mentioned person is required to take out a dealer's certificate. Sect. 4, which is here material, enacts "That if any person licensed to deal in game by virtue of this Act" "shall buy or sell, or knowingly have in his house, shop, stall, possession, or control, any bird of game after the expiration of ten *days (one inclusive and the other exclusive) from the respect- [*446 ive days in each year on which it shall become unlawful to kill or take such birds of game respectively as aforesaid; or if any person, not being licensed to deal in game by virtue of this Act" "shall buy or sell any bird of game after the expiration of ten days (one inclusive and the other exclusive) from the respective days in each year on which it shall become unlawful to kill or take such

birds of game respectively as aforesaid, or shall knowingly have in his house, possession, or control, any bird of game (except birds of game kept in a mew or breeding place) after the expiration of forty days (one inclusive and the other exclusive) from the respective days in each year on which it shall become unlawful to kill or take such birds of game respectively as aforesaid; every such person shall on conviction of any such offence" "forfeit and pay for every head of game so bought or sold, or found in his house, shop, possession, or control, such sum of money, not exceeding 1*l*., as to the convicting justices shall seem meet, together with the costs of the conviction." There is nothing in this enactment to limit the meaning of the expressions "bird of game" and "head of game" to dead birds of game. Taking the whole section together, it is clear that the Legislature intended to guard against any interference with live birds during the close or breeding season, no less than against their destruction during that season. Accordingly the section, after enacting that no licensed dealer in game may buy, sell, or knowingly have in his shop or possession any bird of game after the expiration of ten days from the end of the shooting season, and that no other person may deal in game after the

*447] expiration of the same period, goes on to prohibit "all such other persons from having in their possession any bird of game (except birds of game kept in a mew or breeding place) after the expiration of forty days from the end of the shooting season. The exception just referred to shows plainly that the Legislature had live birds in its contemplation. [WIGHTMAN, J.—You contend that licensed dealers in game may have birds of game, whether alive or dead, in their possession for ten days only after the close of the shooting season; and that other persons, after forty days from that time, may have birds of game in their possession only if alive and in a mew.] That is the true construction of the section. In *Rex v. Marsh*, 2 B. & C. 717 (E. C. L. R. vol. 9), the defendant was held properly convicted, under stat. 5 Ann. c. 14, s. 2, which mentions "game" only, for having in his possession a quantity of live game. So, in *Helps v. Glenister*, 8 B. & C. 558 (E. C. L. R. vol. 15), it was held that stat. 58 G. 3, c. 75, which, in general language, made the buying of game an offence, prohibited the buying of pheasants in all cases: and that, therefore, by a contract for the sale of live pheasants, no property passed to the purchaser. The decision in *Porritt v. Baker*, 10 Exch. 759, turned upon the form of the plea; which was held bad, as not necessarily showing a contract rendered illegal by stat. 1 & 2 W. 4, c. 32. If that case is to be taken to have decided that sect. 4 of that Act applies only to dead game, it cannot be supported. If live game be not within the section, a dealer in game might buy any number of live partridges from poachers on the 31st of August, and kill and sell them on the 1st of September, without in any way contravening the Act.

*448] *Lush*, contra (called upon by the Court).—The case, no doubt, falls within the literal words of the statute, taken in their most general acceptation; but the justice of the case requires that they should receive a limited meaning, and be taken to refer to dead game only. Several cases, decided under earlier statutes in *pari materia*, show how such Acts ought to be construed. Thus in *Simp-*

son *v. Unwin*, 3 B. & Ad. 184 (E. C. L. R. vol. 23), it was held that a person who had in his possession, on the 9th of February, partridges and a pheasant killed before the 1st, was not guilty of any offence against stat. 2 G. 3, c. 19, ss. 1 and 4, which imposed a penalty on any person who should, after the 1st of that month, kill or have in his possession such game. So again, in *Bridger v. Richardson*, 2 M. & S. 568, it was held that stat. 3 Jac. 1, c. 12, which prohibited persons from willingly taking, destroying, or spoiling any spawn of fish, meant thereby a taking for destruction, and not a taking for the purpose of removing the spawn to beds, for further growth and maturity, to make it marketable. So, in the Act now in question, "take" must mean "take for the purpose of destroying," and does not apply to a taking for purposes of breeding. [BLACKBURN, J.—Throughout the section the words "kill or take" occur together. If "take" has the meaning for which you contend, "kill" would have been sufficient to include it.] A poacher might take birds alive and hand them over to a dealer to be killed. [WIGHTMAN, J.—I doubt whether the Legislature intended to provide for the case of a taking of game by hand.] *Porritt v. Baker* is in the respondent's favour. [BLACKBURN, J.—That case does not go far enough for your purpose.]

*(COCKBURN, C. J., was absent.)

WIGHTMAN, J.—I entertain no doubt whatever but that the words "birds of game" in stat. 1 & 2 W. 4, c. 32, s. 4, include live birds. The words must have the same meaning throughout the section, and the reference in its second clause to "birds of game kept in a mew or breeding place" shows plainly that the Legislature had live birds in view. I do not see that *Porritt v. Baker* touches the present case.

HILL, J., and BLACKBURN, J., concurred.

Case sent back to the magistrate for rehearing.

END OF MICHAELMAS VACATION.

CASES

ARGUED AND DETERMINED

THE QUEEN'S BENCH,

Hilary Term,

XXIV. VICTORIA. 1861.

The Judges who usually sat in Banc in this Term were:—

COCKBURN, C. J.
WIGHTMAN, J.

CRAMPTON, J.
HILL, J.

The QUEEN, on the Prosecution of the The EASTERN COUNTIES Railway Company, Appellants, *v.* The Overseers of the Poor of the Parish of FLETTON, Respondents. *Jan. 12.*

Appellants, a railway Company, being the sole proprietors and occupiers of a railway station on their line, in 1848 entered into an agreement with another railway Company, by which the latter were, for a certain annual payment, to have for 999 years the joint use of the station for their traffic, appellants continuing to be occupiers of the station, subject to such use. In 1859, the annual value of the station having then from various causes fallen very much below the sum paid annually to appellants, under this agreement, by the other Company, appellants were assessed to a poor-rate in respect of the station, on the full sum so paid to them.

In a case stated for this Court, on an appeal by appellants to Sessions against this rate, on the ground that the rateable value of the station was not the rent actually paid but the rent which could be actually obtained for it from a hypothetical tenant from year to year, it was stated as an admitted fact that appellants were the persons rateable in respect of the whole occupation of the station. Held, that appellants were properly rated on the full amount paid by the other Company; appellants being sole occupiers of the station, subject to an easement by the other Company, and the payment being a profit arising out of appellants' occupation.

At the Huntingdonshire Quarter Sessions held in January, 1860,
*451] on an appeal by The Eastern *Counties Railway Company
against a poor-rate for the parish of Fletton, in that county,

made on 17th August, 1859, in and by which the Company were rated and assessed in respect of certain lands and premises in Fletton, whereof they were described as owners and occupiers, on a rateable value of 1889*l.* 15*s.*; the Sessions amended the rate by reducing the said rateable value to the sum of 635*l.*, subject to the opinion of this Court on the following case.

The rate was duly appealed against by The Eastern Counties Railway Company, on the ground that they were overrated therein, and that certain other persons to whom notices of appeal were also given were underrated therein. The rate was not appealed against on the ground that any persons were omitted from the rate who ought to have been included therein and rated thereby; and the only grounds of appeal material to this case were the following, namely: Secondly. That the said rate or assessment, as against and as regards the said Company, is bad and of no force or validity, inasmuch as it was not, nor is it, so far as the same relates to the said Company and their assessment therein, made upon an estimate of the net annual value of the railway lands, station, tenements, hereditaments and premises, occupied by the said Company in the said parish of Fletton, and in respect of which they are rated and assessed in the said rate or assessment (that is to say), upon an estimate of the rent at which the same might reasonably be expected to let from year to *year, free [*452 of all the usual tenant's rates and taxes, and tithe commutation rent charge (if any), and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses (if any) necessary to maintain them in a state to command such rent, according to the provisions of the statute in that case made and provided: but the said rate or assessment, so far as the same relates to the said Company and their assessment therein, was and is made upon an estimate of more than the net annual value of the said railway lands, station, tenements, hereditaments and premises, occupied by the said Company in the said parish of Fletton. Thirdly. That the said Eastern Counties Railway Company are, in and by the said rate and assessment, overrated and over assessed in respect of the property and premises occupied by them in the said parish of Fletton, in respect of which they are rated and assessed in the said rate or assessment; and are rated and assessed in the same rate or assessment at and upon a greater sum and sums than they ought to have been, or to be, rated or assessed at or upon in the said rate or assessment.

At the trial, the contest was confined to the assessment of the property hereinafter called "The Station," and named in the rate "Eastern Counties Railway Station, &c." The station consists of between twenty and thirty acres of land in the parish of Fletton, of which the appellants were and are the owners. It is bounded on one side by the navigable river Nene, and comprises station buildings, platforms, sheds, sidings and all other descriptions of accommodation proper to railway stations, and for the most part expressly named *in the rate.(a) The appellants were and are in occupation of a great [*453

(a) The description of the property in the rate was as follows: "The Peterborough railway station, platform, sheds, machines, wharf, sidings, electric telegraph office and wires, main line of railway, thirty chains in length, cattle pens, workshops, roads, garden land, and fifteen houses and cottages occupied by the Company's servants &c."

part of it, and for the purposes of this case are to be deemed to be the persons rateable in respect of the whole occupation.

Prior to the month of April, 1848, and up to and at the time of the making of the agreement next hereinafter mentioned, there existed great competition between the appellants and The London and North-Western Railway Company, for the traffic in goods and passengers between Peterborough and London, and between Peterborough and places to the north and east of Peterborough. The London and North-Western Railway Company at that time used a portion of the station in question, in part exclusively, and in part jointly with the appellants.

On 15th April, 1848, the appellants and the London and North-Western Railway Company entered into an agreement by deed, between the appellants of the first part, and the London and North-Western Railway Company of the second part. This deed recited that the two companies had constructed and opened for traffic railways to Peterborough, in continuation of their respective lines from London; that the station at Peterborough, used in common by them, had been erected at the sole expense of the appellants, and a portion of the line leading to such station, about (a) chains in length, over which the traffic of the London and North-Western Company to and from *454] Peterborough was carried, was the "sole property of the appellants; that such last-mentioned portion of line, and the said station, had for some time past been used by The London and North-Western Railway Company, and arrangements had also been made between the two Companies for the future conduct of the Peterborough traffic with the Metropolis, in order to insure every proper accommodation to the public; and, that the Companies had, in reference to all such arrangements, agreed to enter into the terms and stipulations hereinafter contained. It then witnessed "That, in consideration of the premises, the said two Companies do mutually covenant and agree with each other as follows (that is to say):

First. That the said Company of the second part shall, paying the rents and performing the conditions of this agreement, be entitled to use the said station and portion of line aforesaid, jointly with the said Eastern Counties Railway, for the term of 999 years, for which term of years this agreement shall subsist and continue, and be in full force and effect, and binding upon both the said Companies in respect of all the terms and stipulations thereof.

Second. That the said Company of the second part shall, for the said portion of line and station, pay annually, by half-yearly payments on the 1st July and 1st January, the following rent and expenses (that is to say), first, Such sum annually as shall be equal to one mile's gross earnings, after deducting forty per cent. thereof to cover all expenses for each year, upon that portion of the London and North-Western Railway which lies between the Peterborough and Sibson Stations: second, Such sum annually as shall be equal to five *455] per cent. per annum upon the costs of the land and buildings "to be occupied exclusively by the said Company of the second part: third, Such sum annually as shall be equal to seven per cent. per annum upon one-half of the outlay of the station and buildings

(a) Sic.

jointly used by the said two Companies, with the exception of land, and as shall be equal to five per cent upon the land occupied by such jointly-used station and buildings: fourth, One moiety of the expenses of the management and conduct of the said joint station: fifth, That the said Company of the second part shall keep in repair, at their own expense, so much of the said station and buildings as they shall exclusively occupy as aforesaid, and shall repay the said Company of the first part all the outlay they have made upon internal fittings: sixth, That the said Company of the first part shall keep in repair, at their own expense, the station and buildings to be jointly used, and shall manage and conduct the affairs and business of the said joint station, and shall deliver an account, half yearly, to the said Company of the second part of the expenses of such management; and that the said Company of the first part shall provide the same amount of accommodation, in all respects, for the said Company of the second part, as for themselves, and act with impartiality in the management of the said station: seventh, That the receipts for the through passenger and goods and cattle traffic between Peterborough and London, whether passing over the Eastern Counties or the London and North-Western Railway, shall be equally divided each half-year between the two Companies, and separate accounts shall be kept of such passenger traffic, and of such goods and cattle traffic; and that there shall be allowed to the Company who shall carry the larger proportion of passenger traffic, a sum equal to ten per cent. upon the [456 excess of the passenger traffic of the one Company over the like traffic of the other Company; and to the Company who shall carry the larger proportion of goods and cattle traffic, a sum equal to twenty per cent. upon the excess of the goods and cattle traffic of the one Company over the like traffic of the other Company; the amount of such goods and cattle traffic in the case of each Company being made up and calculated exclusive of all charges for collection, cartage, and delivery."

(The remainder of the deed is not material.)

The station at Peterborough, used in common by the said two Companies, as mentioned in the said agreement, is "The Station" named in the rate; and ever since the execution of the said agreement the same has been, and still is, in force and effect, and the occupation of the station has been in fact under and in conformity with the said agreement; and, leaving out of consideration the sum receivable by the appellants in respect of the portion of the line described in the recital of the said indenture as "a portion of the line leading to such station," on which, for the purposes of this case, nothing turns, the sum annually receivable by the appellants from the London and North-Western Railway Company, under the said agreement, and charged in their published accounts to their credit as so receivable (and which, in fact, has been in part received, and no reason has been assigned in the said accounts, or was alleged at the trial, why the remainder should not be received, except that at the trial it was sworn that the London and North-Western Railway Company had refused to pay the same), has annually amounted and still amounts, after deducting the expenses of the management and conduct of the *said [457 joint station, to 5084*l.* 8*s.* 1*d.*; that is to say, to 1785*l.* 10*s.*,

being a sum equal to 5*l.* per cent. per annum upon the cost of the land and buildings exclusively occupied by the London and North-Western Railway Company, and to 8848*l.* 13*s.* 1*d.*, being a sum equal to 7*l.* per cent. per annum upon one half of the outlay of the station and buildings jointly used by the said two Companies, and 5*l.* per cent. per annum upon the land occupied by such jointly-used station and buildings.

For the purposes of the case the following statement was to be taken as true.

Up to the year 1850, a very large traffic, both in passengers and goods, from Peterborough and the North-Eastern and Midland Counties, was carried to London by the Eastern Counties Railway; with a view to which traffic the station was laid out and erected by the appellants. The traffic from these districts was brought on to the Eastern Counties Railway at Peterborough, by the Great Northern Railway (which did not then extend towards London further than Peterborough); by the Peterborough and Syston branch of the Midland Railway; and by the London and North-Western Railway. In the year 1850, the Great Northern Railway was opened from Peterborough to London, by a route which was shorter than that of the Eastern Counties Railway by twenty-six miles. Immediately upon the opening of the Great Northern Railway, all the passenger traffic and a large portion of the goods traffic between Peterborough and London was diverted from the Eastern Counties Railway to the Great Northern Railway. Goods, however, were still brought on to the Eastern Counties Line at Peterborough, by the Midland Railway Company, *458] until the year 1857, when, by the opening of *the Leicester and Hitchin Railway, the Midland Railway Company obtained an independent route to London, and accordingly ceased to send goods from Peterborough to London by the Eastern Counties Railway. In 1858, the Welwyn and Hertford branch line was opened, by which the traffic at Peterborough was still further diminished; and since that year (with the exception of coals as hereinafter mentioned), the traffic at Peterborough of all kinds, so far as the appellants are concerned, has been entirely confined to the short local traffic. For the purpose of such traffic, an ordinary road side station would be sufficient; and, in consequence of this diminution in the traffic, a large repairing shop and other buildings at the station in question have been taken down, and others have been allowed to fall into decay. The Great Northern Railway Company have an entirely separate station at Peterborough, for the purposes of their own traffic. Between Peterborough and Ely, to which branch the station in question belongs, the traffic is so small that the branch is worked at a loss by the appellants. There is a considerable coal traffic belonging to the appellants, passing through the station. There is no depôt of coals there, but the sidings are made use of for the purpose of shunting the trains, and additional sidings have from time to time been laid down for this purpose. There is a great competition between the railway Companies for this coal traffic, and the rates are low, and this branch of the traffic only becomes profitable when the coals are carried in large quantities and for long distances. The buildings comprised in the station are now used in many cases for purposes entirely different and

inferior to that for which they were originally erected, the offices intended for passenger traffic *being used for store rooms and other similar purposes. To an ordinary tenant, for any other purpose than that of a railway, the station would be of no annual value, if he were bound to maintain the buildings in a state of repair. [*459]

At the trial of the appeal, the annual rateable value of the station, as used for the purposes of a station and for the purposes to which it was in fact applied, after making all deductions, was estimated by the witnesses called by the appellants at sums not exceeding 635*l.*, but those witnesses in ascertaining the said annual rateable value did not take into account the said annual sum receivable by the appellants from the North-Western Railway Company under the said agreement, or any part thereof.

It was contended for the appellants that the said annual sum had been agreed upon, in 1848, under a different state of circumstances, for the objects mentioned in the agreement; and ought not to be taken into account in ascertaining the annual rateable value of the station, or the sum at which it would now let to a tenant from year to year. And that the appellants were not, and are not, by law, liable to be assessed to the rate in respect of or upon that sum or any part of it.

The respondents contended that the hypothetical tenant from year to year contemplated by stat. 6 & 7 W. 4, c. 96, must be supposed to be placed in the same position as the appellants in respect of the payment made under the agreement, such payment arising necessarily out of the occupation. That if the tenant would be entitled to the payment, it would enhance the amount of the rent which as tenant from year to year he would be willing to offer for the station; and that, therefore, the *appellants were by law liable to be assessed to the rate in respect of or upon such payment. [*460]

The Sessions were of opinion that the annual rateable value of the station, not estimating the payment from the North-Western Railway Company, was 635*l.*, and they ordered the rate to be amended by substituting in it the sum of 635*l.* for the sum of 1889*l.* 15*s.*

The question for the Court was whether the sum of money payable to the appellants, under the agreement of 1848, by the London and North-Western Railway Company, ought to form part of the rateable value of the station.

If the Court should answer the question in the negative, the order of Sessions was to be confirmed, and the rate to stand amended; if in the affirmative, the order of Sessions was to be quashed, as to the substitution therein of 635*l.* for 1889*l.* 15*s.*, and the said sum of 1889*l.* 15*s.* was to remain in the rate.

Bovill and *Markby*, for the appellants.(a)—The Sessions were right in not taking into account the payments made to the appellants under the agreement of April, 1848, as enhancing the rateable value of the appellants' station. The appellants ought to be rated on the present rateable value of the station; and the criterion of that value is not the amount which the appellants now receive, under the agreement, from The London and North-Western Railway Company, for its use, but the rent which they could now obtain for it from a tenant from year to year; which rent would fall greatly short of the sum now in

fact annually paid to the appellants. Although that payment is some
 *461] evidence of the rent at which the station might reasonably be
 expected to let to a tenant from year to year, it is not the
 proper criterion of the rateable value, which depends upon the present
 annual value of the station: *South-Eastern Railway Company v. Overseers of Dorking*, 8 E. & B. 491 (E. C. L. R. vol. 77); *Regina v. Eastern Counties Railway Company*, 28 L. J. N. S. M. C. 96, note (18).
 And the circumstances stated in the present case show that no such a
 rent would now be obtainable. The appellants, though occupiers of
 the rated property, receive the payment under the agreement, not as
 occupiers but as proprietors; the payment, that is to say, is not received
 in respect of their occupation at all. Were they to go out of occupa-
 tion of the whole of the station to-morrow, they would still be entitled
 to the payment, which is analogous to a personal annuity. In *New-
 market Railway Company v. St. Andrew's the Less, Cambridge*, 8 E.
 & B. 94 (E. C. L. R. vol. 77), the majority of this Court held that a
 payment to one railway Company by another, under agreement, of
 such a sum, if any, as may be necessary to make up a certain divi-
 dend on the cost of the line, in consideration of the making of a part
 of it, and of working it for the benefit of the latter Company, is not
 a profit arising out of the occupation of the railway, and is not to be
 taken into account in assessing its rateable value. [BLACKBURN, J.—
 In that case Lord Campbell, C. J., differed from Coleridge and Erle,
 Js., and thought that the sum paid under the guarantee was received
 by the Newmarket Company in respect of their occupation of their
 railway, and was part of the profits of that occupation.] In *Rex v.*
Bedworth, 8 East 387, it was held that where a coal-mine, becoming
 *462] unproductive, ceases to be worked, the lessee is no longer
 liable to be rated for it to the relief of the poor, although he
 be still bound by his covenant to pay the rent reserved to his land-
 lord. In the present case the liability of The London and North-
 Western Railway Company, under their covenant, to pay the appel-
 lants the sum stipulated in the agreement, is as independent of the
 occupation of the station, as if the station had altogether ceased to be
 occupied.

Keane, Metcalfe, and Douglas Brown, contra.—By the agreement, the
 annual payment is secured to the appellants for 999 years; for the
 whole of which time they are thus protected against any depreciation
 in the annual value to them of the station. It is not, therefore, open
 to them to say that circumstances have altered that value since the
 agreement was entered into. [BLACKBURN, J.—It is possible for the
 two Companies at any time to agree that the payment shall cease.]
 Decided cases, as was said by the Court in giving judgment in *Rex v.*
The Proprietors of the Liverpool Exchange, 1 A. & E. 465, 474,
 “establish the principle, that the advantages attendant upon a build-
 ing, either in respect of its situation or the mode of its occupation,
 are to be taken into the account in estimating its rateable annual
 value, wherever those advantages would enable the owner of the
 building to let it at a higher rate than it would otherwise fetch.”
 Taking that as the test, the appellants, were they now to let the whole
 of the station to a tenant from year to year, would obtain from him a
 higher rent than it would otherwise fetch, by reason of the payment

which the London and North-Western Company is bound to make annually in respect of it. ***[BLACKBURN, J.—**You assume that a tenant from year to year would be entitled to receive that [*463 payment.] At all events, the payment is part of the profits of the appellants' occupation of the station. The judgment of Lord Campbell, C. J., in *Newmarket Railway Company v. St. Andrew's the Less*, Cambridge, 3 E. & B. 94, is directly in favour of the respondents; and the law laid down by him was not questioned by the other Judges, who differed from him only as to the construction to be put upon the agreement which was in question. In *Allison v. Overseers of Monkwearmouth Shore*, 4 E. & B. 13, it was held that the occupier of a brewery under a lease, by which the custom of several public-houses, belonging to the owner of the brewery, was secured to him, he paying an annual sum in respect of this advantage, which enhanced the value of the brewery to him, was properly rated on the enhanced value, it being an advantage connected with the occupation, which would be taken into calculation by a tenant in estimating the annual rent.

Cur. adv. vult.

COCKBURN, C. J., now delivered the judgment of the Court.(a)

This was a case stated for the opinion of the Court, by the Court of Quarter Sessions for the county of Huntingdon, on an appeal by The Eastern Counties Railway Company against a rate made on them in respect of their railway station at Peterborough. The facts, so far as they are material, are shortly as follows. The Eastern Counties Railway Company, being the sole proprietors of the station in question, in the year 1848 *entered into an agreement with The [*464 London and North-Western Railway Company, to endure for the term of 999 years, whereby the latter Company were to have the joint use of the station for their traffic; they, on the other hand, binding themselves to pay for such use of the station according to certain terms stipulated in the agreement. The direct Northern Railway having since been opened, a considerable portion of the traffic of the North-Western Line has in consequence been abstracted, and the station has become worth much less to The London and North Western Company; and there is no doubt that, if the matter were res integra, if the present London and North-Western Company, or any other Company working their line, unfettered by the existing agreement, proposed to take from The Eastern Counties Railway the use of the station at a yearly rent, such rent would barely amount to a third part of the sum actually paid. The parish of Fletton, in which the station in question is situate, having assessed The Eastern Counties Railway in the larger sum, the Company appealed against the rate on the ground that, according to the Parochial Assessment Act, the rateable value is not the rent actually paid by the occupier, but that which it may be presumed that an incoming tenant from year to year would give for the subject-matter of the occupation. Adopting this view, the Court of Quarter Sessions ordered the rate to be amended, by reducing the rateable value on which the Company had been assessed from the sum of 1889*l.* 15*s.* to 685*l.* We are of opinion that this decision was erroneous, and that the original assessment was right. The fallacy of the argument in favour of the appellants con-

(a) Cockburn, C. J., and Blackburn, J.

sists in looking at The London and North-Western Company as the occupiers, and in considering what a *tenant from year to *465] year, coming in in their place, would pay as rent for the use of the station. But The London and North-Western Company are not occupiers of the station at all; they have only an enjoyment by way of user; in other words, an easement. The occupiers are The Eastern Counties Company, subject to the easement of the other Company; and the true question is, what would a tenant, coming into the place of The Eastern Counties Company, give for such occupation? Now, it is plain that a tenant coming into their place, in considering what rent he would give after the necessary deductions, would take into account, as increasing the value of the premises, the amount to be annually paid by The London and North-Western Railway Company for their use of the station. It is true The Eastern Counties Company, if they were to let the station, though they could, of course, only let it subject to the right of The London and North-Western Company to use it, might, taking a lower rent from their immediate lessee, reserve to themselves the receipt of the amount annually payable by The London and North-Western Company. Whether under such circumstances, they would or would not still remain liable as occupiers, quoad a moiety of the line, The London and North-Western Company having only an easement therein, it is unnecessary to decide. It is sufficient, in our opinion, for the present purpose, to say that, *rebus sic stantibus*, they are assessable to the full amount of what they receive. The true principle, according to which the value of the occupation to the hypothetical tenant contemplated by the Parochial Assessment Act is to be estimated, is, to assume the continuance of those circumstances which constitute the value to the existing occupier, unless it be made to *466] appear that those circumstances are about *to undergo a change. But there is nothing in the present case to lead to the supposition that The Eastern Counties Company will either forego their right under a very advantageous agreement, which is to bind the London and North-Western Company to a very remote future, or that The Eastern Counties Company will either let the station to any other occupier, or, if they do, will place such occupier, relatively to the other Company, in a different position from that in which they themselves stand. It will be time enough to deal with such altered circumstances when they arise. At present the Eastern Counties Company, as occupiers of this station, derive a profit not only from their own use of the station, but also in respect of the sum annually paid by The London and North-Western Company for their use of it; and they ought in justice to contribute to the local burdens in proportion to the entire benefit which they derive from the occupation; and we think that they fail legally, as they certainly do morally, in the attempt to withdraw themselves from such fair and equal contributions.

The order of Quarter Sessions must, therefore, be quashed, and the rate will stand according to the original assessment.

Order of Sessions quashed.(a)

(a) Bovill subsequently, on Saturday, January 26th, asked leave to mention this case, on the ground that the judgment had possibly proceeded on a misapprehension of the facts;

***BENNETT v. GRIFFITHS and Another. Jan. 12. [*467**

The Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 58, enacts that "either party" to an action "shall be at liberty to apply to the Court or a Judge for a rule or order for the inspection by the jury, or by himself, or by his witnesses, of any real or personal property the inspection of which may be material to the proper determination of the question in dispute; and it shall be lawful for the Court, or a Judge, if they or he think fit, to make such rule or order, upon such terms as to costs and otherwise as such Court or Judge may direct."

Held, that this section gives, as ancillary to the power to order inspection, the same power to order the removal of obstructions, with a view to inspection, which is exercised by the Courts of equity as ancillary to their power of ordering inspection.

Plaintiff and defendants were adjacent mine owners. Plaintiff having reason to believe that defendants had encroached upon his mine, obtained permission from them to make an inspection of their mine, when he found a recently erected wall at the boundary between the two mines, which prevented him from ascertaining whether defendants had encroached upon his mine or not. Application by him to defendants for permission to take down a portion of this wall in order to complete the inspection having been refused, plaintiff applied to a Judge at Chambers, under the above section, for an order for inspection. The Judge, upon being satisfied that a portion of defendants' wall could be safely removed, and an inspection behind it made without danger to life, and with no further detriment to defendants than a temporary suspension of their works, made an order that plaintiff should inspect defendants' mine at and behind the wall, and should be at liberty, so far as was necessary for the purpose of the inspection, to make a driftway through the wall; before making the inspection giving security to the satisfaction of the master to the extent of 500*l.*, or depositing that sum with the master, to abide any order the Court might make as to indemnifying defendants from any loss or damage they might sustain in consequence of the inspection.

Held, refusing a motion on behalf of defendants for a rule calling on plaintiff to show cause why this order should not be set aside, that the order was good, and not in excess of the Judge's jurisdiction under the statute.

GRAY, in last Michaelmas Term, moved for a rule calling on the plaintiff to show cause why an order of Blackburn, J., for the inspection of a mine of the defendants should not be set aside.

It appeared from the affidavits that the plaintiff was the owner of certain coal-mines situate at Titford, near Oldbury, in the county of Worcester, containing an area of forty acres or thereabouts. The defendants were the lessees and occupiers of other mines adjoining to the said mines of the plaintiff, and which the defendants were engaged in working at the time the said order was made. The plaintiff having cause to believe that the *defendants had encroached upon his [*468 mine, applied to them, on 2d October, for permission to make an inspection of their mine. On 26th October a mine agent, employed for the purpose by the plaintiff, was allowed to go down into the mine, when he found that the defendants were working and getting a measure called the "thick coal." He made his survey from the pit shaft, along a gate road, to the boundary of the plaintiff's mine; and at the boundary he found a recently erected wall or building, which, according to his affidavit, divided the mines of the plaintiff from the mines of the defendants, and extended thirty yards or thereabouts. Application was made to the defendants to allow this wall to be taken down, in order that the plaintiff's agent might see whether or not any

and he called attention to the clauses in the agreement by which it appeared that the London and North Western Company were to have exclusive occupation of part of the station, and to the statement in the case that the occupation had in fact been under and in conformity with the agreement. But Cockburn, C. J., said that there had been no misapprehension, and that the judgment was based on the statement in the case that, for the purposes of the case, the appellants were to be deemed to be the persons rateable in respect of the whole occupation.

encroachment had been made beyond it; but the defendants refused to allow that to be done. There were no means by which it could be ascertained whether such an encroachment had taken place, except by taking down a portion of the wall and driving a gate road through it, or by making a road from the plaintiff's own mines at an expense of about 1000*l*. The time occupied in the latter process would be about six months. The plaintiff had reason to believe that about 1000 square yards of his coal had been taken away by the defendants. On the part of the defendants it was sworn that it would be injurious to their mines if a gate road were driven through the wall; that the wall which had been erected was only the usual and proper wall, erected for the purpose of strengthening the gate road in that portion of the mine, and that the workings had been confined to the getting of coal within their own boundaries. A summons had previously been *469] obtained for an inspection *of the defendants' mines, and, under the state of things above set out, Blackburn, J., made an order that that summons should be adjourned for a week, to procure a report from the inspector of mines as to the practicability, especially with reference to the safety of the mine, of making an inspection behind the wall mentioned in the affidavits; the plaintiff undertaking to abide by any order the Court might make as to paying expense or loss incurred during his inspection. In obedience to this order, the inspector of mines for the district was allowed to go down into the defendants' mines on 13th November, but he was unable to make a satisfactory examination, in consequence of the damp in the mine. The defendants refused to allow any person employed by the plaintiff to go into the mine with the inspector, although the latter informed them that his inspection would not be satisfactory unless that was done.

On 16th November, Blackburn, J., made an order, further adjourning the summons, and ordering that the defendants should give to the inspector all such facilities as he should require, including permission for such persons as he should think fit to accompany him for the purpose of the inspection.

On 20th November, the inspector made his report, to the effect that an inspection could be made behind the wall, either by making a headway in the solid coal, near the wall, or by removing a portion of the wall itself, which consisted chiefly of short round timber, longitudinally packed; that a portion of the return air-current from the workings might be diverted, and safely used by the plaintiff for the purpose of ventilating such workings as might be deemed expedient for such inspection. He further reported that no practical difficulty *470] existed, *calculated to endanger the lives of the workmen employed; and that the inspection sought by the plaintiff was not likely to prove detrimental to the present or future workings of the mine, beyond a temporary suspension of the works of the defendants.

BLACKBURN, J., then made an order "that the plaintiff be at liberty, by his witnesses, workmen and agents, to inspect the defendants' mine, at and behind the wall in the affidavits and the inspector's report mentioned; that for this purpose the defendants give all reasonable facilities for access to and in the mine, and for ventilation

during the process; and that the plaintiff be at liberty, so far as is necessary for the purpose of the inspection, to make a driftway, as described in the inspector's report. That, before commencing the inspection, the plaintiff give security to the satisfaction of the Master, to the extent of 500*l.*, or deposit that sum with the Master, to abide any order the Court may make as to indemnifying the defendants for any loss or damage which may be sustained in consequence of this inspection."

Gray, for his rule. (a)—The defendants do not dispute the propriety of Blackburn, J.'s order, or the justice of its terms; but they submit that he had no jurisdiction to make it. Sect. 58 of The Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, enacts that "either party shall be at liberty to apply to the Court or a Judge for a rule or order for the inspection by the jury, or by himself, or by his witnesses, of any real or personal *property the inspection of which may be [*471 material to the proper determination of the question in dispute; and it shall be lawful for the Court, or a Judge, if they or he think fit, to make such rule or order, upon such terms as to costs and otherwise as such Court or Judge may direct." [BLACKBURN, J.—I thought that, as that section empowers the Judge to order inspection of property, it gives him, by implication, authority to order all things ancillary to the inspection to be done. I believe that the Courts of equity exercise such a jurisdiction.] The section contains no reference to the practice of the Courts of equity; differing in that respect from stat. 14 & 15 Vict. c. 99, s. 6, which empowers the common law Courts to compel inspection of documents whenever equity would grant a discovery. The Legislature would have referred to the practice of equity in the one case as in the other, had they intended it to be taken as a guide. [COCKBURN, C. J.—The word "inspection" may have acquired a meaning in the Courts of equity, and may be used in that meaning in sect. 58 of The Common Law Procedure Act, 1854. HILL, J.—Assuming, as appears not improbable, that the defendants have purposely constructed the wall for the express purpose of preventing the inspection, do you contend that the Court is powerless to defeat them in that design?] The argument for the defendants must go to that extent; no provision has been made by the Act for such a state of things. *Patent Type Founding Company v. Lloyd*, 5 H. & N. 192, is in point. In that case the Court of Exchequer refused an application by the plaintiffs in an action for the infringement of a patent for the making of type by a certain combination of *metals, for liberty [*472 not merely to inspect the defendant's types, but to take specimens thereof, if necessary, for the purpose of analysis. The application was made under The Patent Law Amendment Act, 1852, 15 & 16 Vict. c. 83, s. 42, which, like the 58th section of The Common Law Procedure Act, 1854, merely empowers the Court to make an order for an inspection. If the present order is upheld, it is difficult to say what orders for the inspection of property may not be made. It is conceivable, for instance, that such an order might go the length of directing a house to be pulled down, and yet be valid. The safer construction of the statute is that it contemplates the ocular inspection only of property.

(a) Monday, November 26th, 1860.

Macnamara showed cause in the first instance.—It is not disputed by the other side that the Judge had power to order an inspection of the defendants' mine, in order that it might be ascertained whether or not they had encroached on the plaintiff's. But the inspection thus ordered must be an efficient inspection, or the order will amount to a nullity. In the present case, the inspection could be made only by taking down a part of the defendants' wall. The Judge had therefore jurisdiction to make an order to that effect. The case falls within the principle that, when anything is given by the law, that also is given without which the thing cannot be enjoyed. *Patent Type Founding Company v. Lloyd*, if in point, is distinguishable. There, the plaintiffs' application, if granted, would have involved the destruction of some of the defendant's property; here, the defendants will *473] suffer nothing beyond a temporary inconvenience from *the plaintiff's inspection of their mine, and the order carefully provides that for that they shall be compensated by the plaintiff. In the case in question, the Court of Exchequer thought the analysis of the type unnecessary to the inspection; but Bramwell, B., admitted that there might be cases in which inspection of an article could not be had without consuming a portion of it. Sect. 58 of The Common Law Procedure Act, 1854, empowers the Judge to make the order upon such terms as he may direct. [BLACKBURN, J.—In *Attorney-General v. Chambers*, 12 Beav. 159, the Master of the Rolls made an order that the Commissioners of Woods and Forests should have liberty to enter, inspect and examine the coal-mines of the defendants, and to take all necessary steps for enabling them to make and perfect a complete survey.] The order now before the Court limits the plaintiff to doing no more than is necessary for the inspection.

Gray was heard in reply.

Cur. adv. vult.

COCKBURN, C. J., now delivered the judgment of the Court.

In this case the plaintiff, who is owner of minerals adjacent to a mine worked by the defendants, having reason for believing that the defendants had worked across the boundary and removed his coal, applied to them, on the 2d of October, for leave to inspect their workings and ascertain if such was the fact. The agent of the defendants put off the inspection from time to time till the 26th of *474] October, when he permitted the *plaintiff's agent to descend into the mines and inspect them. The plaintiff's agent found the workings, as far as he could examine them, to be within the defendants' boundary; but at the boundary between the plaintiff's minerals and the defendants he found a newly erected wall extending for about thirty yards. If there was any encroachment at all, it must have been behind this wall. The plaintiff applied to the defendants for leave to take down part of this wall, so as to ascertain if there was any encroachment behind it, and was refused. He then applied at Chambers for an order, under the 58th section of The Common Law Procedure Act, 1854, to inspect the defendants' mine behind this wall, on affidavits showing a *prima facie* ground for believing that there had been an encroachment behind it. Affidavits were used in opposition, in which it was strongly sworn that any meddling with this wall would produce very injurious effects on the defendants' mine, and be attended with great danger to those engaged in working it, but

containing nothing to raise any doubt that the wall had been recently erected, and that an inspection beyond it would decide at once whether there had been an encroachment or not. The Judge at Chambers (Blackburn, J.) made an order that the government inspector of mines should be permitted to examine this wall, and report on the practicality and safety of an inspection behind it. This order was at first baffled; but on a second and more peremptory order to the same effect, the government inspector of mines did examine it, and reported that an inspection could be made behind the wall, by certain means pointed out in the report, without any practical difficulty or any danger either to the lives *or health of the workmen employed in the said [*475 pits and workings, or with any likelihood of detriment to the present or future workings of the mine, beyond a temporary suspension of the works of the defendants for a few hours, or, at most, for a day. On this Blackburn, J., made an order that the plaintiff, by his witnesses, workmen, and agents, should be at liberty to inspect the defendants' mine at and behind the wall in the affidavits and the inspector's report mentioned; that for this purpose the defendant should give all reasonable facilities for access to and in the mine, and for ventilation during the process; and that the plaintiff should be at liberty, so far as was necessary for the purpose of the inspection, to make a driftway as described in the inspector's report; that before commencing the inspection the plaintiff should give security to the satisfaction of the master to the extent of 500*l.*, or deposit that sum with the master, to abide any order the Court might make as to indemnifying the defendants for any loss or damage which might be sustained in consequence of this inspection, the plaintiff undertaking to fulfil any order in that respect made by the Court. On the last day of last Term, Mr. Gray applied for a rule to set aside this order, against which cause was shown in the first instance. No objection was made to the propriety of the order, or the justice of the terms contained in it, if the Judge had jurisdiction to make it; but it was contended that neither the Court nor a Judge had jurisdiction to interfere with the wall itself, or the defendants' minerals, for the purpose of making an inspection behind the wall. As this was the first instance, as far as we know, in which any question as to the extent of this new *jurisdiction in a Court of common law had been [*476 raised, the Court took time to consider.

We are of opinion that the Judge had jurisdiction to make the order in question. The power to order an inspection of real or personal property has long existed in the Courts of equity; and we find that, as ancillary to that power, the Courts of equity have ordered the removal, where necessary, of obstructions to the inspection. In the notes to *East India Company v. Kynaston*, 3 Bligh O. S. 153, two cases are reported in which, under circumstances very similar to the present, such orders were made. In *Earl of Lonsdale v. Curwen*, 3 Bligh O. S. 168, note, the defendant had worked his own mines, so as, by the rubbish, &c., to obstruct the passages to the spot where the inspection was sought. An order was made that the viewers should inspect the mine, and that the defendant should remove the obstruction. In *Walker v. Fletcher*, 3 Bligh O. S. 172, the defendants had, in working their own mines, either *bonâ fide* to keep out the water,

or colourably to prevent the inspection, erected framed dams and barriers, the effect of which was to drown the part of the mine where it was alleged that the encroachment had taken place. The order made was, that the defendant should remove the framed dams and barriers as the viewers should direct; and that the viewers were to cause the same to be removed, unless they should be of opinion that the collieries would be thereby destroyed. This latter case, which was decided in the time of Lord Eldon, is a strong assertion of the power to remove obstructions to inspection; and seems to us to go far to *477] support, in *that respect, the order now complained of. In the recent case of *Ennor v. Barwell*, 1 De G. F. & J. 529, the Lords Justices varied an order of Stuart, V. C., in which he had directed that the plaintiff should be at liberty to cut trenches in the defendant's ground, in order to ascertain the geological formation of the ground there, as being too extensive; but no doubt was thereby thrown on the jurisdiction exercised in *Earl of Lonsdale v. Curwen*, 3 Bligh O. S. 168, note, or *Walker v. Fletcher*, 3 Bligh O. S. 172. The 58th section of The Common Law Procedure Act, 1854, does not regulate the jurisdiction given to the Courts of law by reference to that already exercised by the Courts of equity; but we think that, as ancillary to the power of inspection given to the Courts of common law, there is the same power given to remove obstructions with a view to inspection, which was exercised by the Courts of equity as ancillary to their power of ordering inspection. The order complained of does not, as it seems to us, go further than that made in *Walker v. Fletcher*. This being our opinion, the rule must be discharged.

Rule discharged.

*478] **SINCLAIR, Administratrix, v. The MARITIME PASSENGERS' Assurance Company.* Jan. 14.

Defendants, a Company established "for granting assurances against loss of life and personal injury arising from accident at sea," granted a policy to S., the master of a ship then about to proceed on a voyage from England to Aden; whereby it was agreed that in case S. "should sustain any personal injury from, or by reason or in consequence of, any accident which should happen to him upon any ocean, sea, river, or lake," during the continuance of the policy, defendants should pay him a reasonable compensation for such injury; and in case he should die from the effects of such injury within three calendar months from the occurrence of the accident, should pay the sum insured to his executors or administrators. It was further agreed by the policy that no compensation should be payable thereunder by defendants, either to S. or his personal representatives, in respect of injury occasioned to S. by wounds in battle or in any way by the act of the Queen's enemies; or in respect of any injury to which S. should knowingly and without some adequate motive expose himself; but it was declared that, with those exceptions, the policy was intended to secure compensation to S. or his representatives "in the event of his sustaining any personal injury during the said intended voyage, from or by reason or in consequence of any accident whatsoever."

S. then sailed on his intended voyage, and in the course of it arrived in the Cochin river, on the south-west coast of India. Whilst on board his ship in that river, and acting as master of the ship, he was struck down by a sunstroke, to which he did not knowingly and without adequate motive expose himself, and from the effects of which on the same day died.

In an action by S.'s administratrix on the policy to recover the sum insured from defendants; Held, that defendants were not liable: for that S.'s death could not be said to have arisen from accident, within the meaning of the policy.

CASE stated by consent, and by order of Blackburn, J., for the opinion of the Court, without pleadings.

This was an action brought by the plaintiff, as administratrix of Lawrence Sinclair, deceased, against the defendants, for the recovery of the sum of 100*l*.

The case stated that Lawrence Sinclair, in the policy of assurance thereafter mentioned, and therein called and described as "the assured," then of South Shields, in the county of Durham, master of the ship Sultan, being about to proceed on a foreign voyage, namely, a voyage from the river Tyne to Aden and elsewhere, did, on 18th March, 1857, effect an assurance on his *life with the defendants, The Maritime Passengers' Assurance Company, "for [*479 granting assurances against loss of life and personal injury arising from accident at sea," for the sum of 100*l*; and did then pay to the defendants the sum of 1*l*. as premium thereon for one year, the said sum of 1*l*. being the amount of premium required by the defendants in consideration of the said insurance; and did afterwards pay or cause to be paid to the defendants, and the defendants did, in March, 1858, accept, the further sum of 1*l*. premium, as a further and continuing consideration for the said insurance of 100*l*; and, at the time of the death of the said Lawrence Sinclair thereafter mentioned, all the premiums due and payable to the defendants in consideration for the said assurance were and had been paid, and the said policy of assurance was in full force and effect. And the said Lawrence Sinclair, in his life, and the plaintiff, administratrix as aforesaid, since his death, had in all things conformed to and performed and kept all things in the said policy mentioned, and all the conditions endorsed thereon, on their parts, and had given all notices required thereby, and all things had happened and been performed, and all times had elapsed necessary to entitle the plaintiff to maintain this action, if the Court should answer in the affirmative the question thereafter proposed for their consideration.

By the said policy of assurance it was (inter alia) agreed that in case the said Lawrence Sinclair, therein called the assured, should sustain any personal injury from or by reason or in consequence of any accident which should happen to him upon any ocean, sea, river, or lake, within the period of twelve calendar months from the date of the said policy, and subsequently *during the continuance of the said [*480 policy, the defendants should be liable to pay and would pay to the said assured a reasonable compensation for the said injury. And it was further agreed that, in case the assured should die from the effects of the said injury within the period of three calendar months from the occurrence of the accident causing such injury, the defendants would pay to the executors or administrators of the said assured the said sum of 100*l*.

And it was further agreed by the said policy of assurance that the assured should not, nor should his legal personal representatives, be entitled to any compensation whatsoever, under or by virtue of the said policy, in respect of any injury, whether resulting in loss of life or not, which should arise from, or be occasioned by, any wound received in battle, or in any way caused by the act of the Queen's enemies, or in respect of any injury to which the assured should knowingly and without some adequate motive expose himself; but, save and except as aforesaid, the said policy was intended to secure

compensation to the assured, or to his legal personal representatives, in the event of his sustaining any personal injury during the said intended voyage, from or by reason or in consequence of any accident whatsoever.

The said assured did, on or about 13th March, 1857, sail in the said ship from the river Tyne on his said intended voyage, and, on or about 29th June, 1858, arrived at and in the Cochin river, on the south-west coast of India; and whilst on board the said ship, in the said river, and while acting as master thereof and superintending the turning of the said ship (which was being hove on to her port side), was struck down by a sunstroke, and died the same day from the effects of the said sunstroke.

*481] *It was admitted that the said assured died from the effects of the said sunstroke, and that he did not knowingly and without adequate motive expose himself to the same. And it was agreed that the said policy of assurance, and the conditions endorsed thereon, should accompany and be taken to be and form part of the case; and that the Court should be at liberty to draw inferences of fact.*

The question, therefore, for the opinion of the Court was, Whether the death of the said Lawrence Sinclair, so caused by the said sunstroke as aforesaid, was death resulting from an accident causing personal injury, within the true intent and meaning of the said policy.

If the Court should be of opinion in the affirmative, then it was agreed by and between the plaintiff, administratrix as aforesaid, and the defendants, that the judgment of the Court should be entered for the plaintiff for the sum of 100*l.* with taxed costs. But if the opinion of the Court should be in the negative, then it was agreed that the judgment of the Court should be entered for the defendants, with taxed costs.

Macnamara, for the plaintiff.(a)—The question is whether sunstroke is an accident, within the meaning of the policy. It falls within the definitions of the word "accident" given in dictionaries. Johnson, for instance, defines the word to mean "That which happens unforeseen; casualty; chance"; and Richardson, "That which falls, or happens, or occurs to; generally with a sub-condition of something unforeseen, unexpected, unfortunate, unnecessary, without

*482] design, contrivance, or *intention." It was clearly contemplated by the policy that the defendants should be liable to a very wide extent. This is shown by the express exception of the defendants from liability for injury occasioned to the assured by wounds received in battle; which injury, it is to be presumed, the parties to the policy regarded as an accident; for otherwise it would have been unnecessary to protect the defendants from liability in respect of it. [HILL, J.—Would you say that death from jungle fever is an accident?] It is not necessary to contend that the term "accident" extends to diseases. [COCKBURN, C. J.—Suppose, in the present case, that the sunstroke had brought on a fever from which death had resulted. HILL, J.—Or that it had brought on a fatal apoplexy.] Even if so, the defendants would probably have been liable; the sunstroke, the primary cause of the injury, being a something happening to the assured ab extrâ, not, like disease, a something ab

intrā. Any injury caused by external agency, which the injured person is unable to foresee, and against which he has no opportunity of guarding, is an accident, at all events within the meaning of this policy. Injury from sunstroke is not alluded to in the exceptions; but the policy declares that "save and except" the specified injuries, the "policy is intended to secure compensation to the assured, or to his legal personal representatives, in the event of his sustaining any personal injury during the said intended voyage, from or by reason or in consequence of any accident whatsoever." [COCKBURN, C. J.—In Indian latitudes, sunstroke is so common a result of exposure to heat that it can hardly be regarded as an accident.] It is not the usual effect of heat in those climates to produce sunstroke. The case finds, moreover, as an admitted fact, *that the assured did not knowingly and without adequate motive expose himself to the sun. [*483 stroke. [COCKBURN, C. J.—He might, however, have anticipated it as a not improbable event.] Hardly so: any more than he might have anticipated being struck by lightning. [HILL, J.—The language of the clause in the policy following the exceptions, is certainly very wide, and you may be justified in contending that the defendants were to be liable for any kind of unforeseen injury, not expressly excepted; though not falling within the strict definition of "accident."] That was the intention. Moreover, it must be remembered that, if there is room for doubt, the words must, according to the general rule, be construed most strongly against the defendants. *Trew v. Railway Passengers' Assurance Company*, 5 H. & N. 211, has some bearing on the present case; but does not decide the question one way or the other.

Geary, for the defendants.—The defendants are not liable. Death from sunstroke was not an "accident" to the assured within the natural and ordinary sense of that word. A disease is not an accident, however rare its occurrence may be. And sunstroke is a disease, rare elsewhere it is true, but in hot climates not uncommon. It is described as a disease in medical works: for instance, in *The Transactions of the Medical and Physical Society of Bombay*, for the years 1857 and 1858; *The American Journal of the Medical Sciences*, Nos. 73 and 75; and several numbers of *The Medical Times*. The cause of the death of the assured was therefore disease, not accident: still less an accident happening *to him upon any ocean, sea, [*484 river, or lake; which class of accidents alone were insured against by the policy.

Macnamara, in reply.—The risks insured against by the policy were not limited to accidents of the sea or rivers; the words immediately following the enumeration of excepted risks show that, with those exceptions, it was meant to cover injuries arising from any accident whatever. The only question is whether the sunstroke was or was not an accident. Having regard to the extensive language of the policy, it clearly was; notwithstanding the theories of medical men as to how far it is to be deemed a disease. *Cur. adv. vult.*

COCKBURN, C. J., now delivered the judgment of the Court.(a)—This was an action brought by the administratrix of one Lawrence Sinclair, on a policy of insurance effected by the deceased with the

(a) Cockburn, C. J., and Hill, J.

defendants, whereby he, being then about to proceed on a foreign voyage as master of a vessel, was insured to the extent of a reasonable compensation against any personal injury from or by reason of or in consequence of any accident which might happen to him upon any ocean, sea, river, or lake; and in the sum of 100*l.* for the benefit of his personal representative, in the event of the assured dying from the effects of any such injury within three months of its occurrence. The assured being with his ship in the Cochin river, on the south-west coast of India, while doing duty on the ship was (as it is termed in *485] the special case) struck down by a sunstroke, from the *effects of which he died in the course of the same day. The question is, whether, under such circumstances, the death of the deceased can be said to have arisen from accident, within the meaning of the policy. We are of opinion that it cannot, and that our judgment must be for the defendants.

It is difficult to define the term "accident," as used in a policy of this nature, so as to draw with perfect accuracy a boundary line between injury or death from accident, and injury or death from natural causes; such as shall be of universal application. At the same time we think we may safely assume that, in the term "accident" as so used, some violence, casualty, or vis major, is necessarily involved. We cannot think disease produced by the action of a known cause can be considered as accidental. Thus disease or death engendered by exposure to heat, cold, damp, the vicissitudes of climate, or atmospheric influences, cannot, we think, properly be said to be accidental; unless at all events, the exposure is itself brought about by circumstances which may give it the character of accident. Thus (by way of illustration), if, from the effects of ordinary exposure to the elements, such as is common in the course of navigation, a mariner should catch cold and die, such death would not be accidental; although if, being obliged by shipwreck or other disasters to quit the ship and take to the sea in an open boat, he remained exposed to wet and cold for some time, and death ensued therefrom, the death might properly be held to be the result of accident. It is true that, in one sense, disease or death through the direct effect of a known natural cause, such as we have referred to, may be said to be accidental, *486] *inasmuch as it is uncertain beforehand whether the effect will ensue in any particular case. Exposed to the same malaria or infection, one man escapes, another succumbs. Yet diseases thus arising have always been considered, not as accidental, but as proceeding from natural causes.

In the present instance, the disease called sunstroke, although the name would at first seem to imply something of external violence, is, so far as we are informed, an inflammatory disease of the brain, brought on by exposure to the too intense heat of the sun's rays. It is a disease to which persons exposing themselves to the sun in a tropical climate are more or less liable, just as persons exposed to the other natural causes to which we have referred are liable to disastrous consequences therefrom. The deceased in the discharge of his ordinary duties about his ship became thus affected and so died.

We think, for the reasons we have given, that his death must be considered as having arisen from a "natural cause," and not from

"accident," within the meaning of this policy. There must be judgment for the defendants.

Judgment for the defendants.

In *Trew v. The Railway Passengers' Assurance Co.*, the assured was drowned at Brighton whilst bathing. As the jury failed to find whether the deceased came to his death by accident or by natural causes, and as drowning might be the result of either, a new trial was awarded in order to ascertain the fact. Cockburn, C. J., said: "He left his lodgings for the purpose of bathing, and his clothes were found by the water-side, but he himself was not afterwards seen. A body was found in the water at a distance from the place where he went to bathe, but not at such a distance that it might not have been carried there by the waves. There was some evidence that this was the body of the assured, and, assuming that it was, the question ought to have been submitted to the jury whether he met his death by drowning. It is true that death occurs in the water in some instances from natural causes, as apoplexy or cramp of the heart, but such cases are rare and bear a small proportion to the number of deaths which take place from the action of the water. We think it ought to be submitted to the jury to say whether the deceased died from the action of the water or from natural causes. If they are of opinion that he died from the action of water causing asphyxia, that is a death from external violence within the meaning of this policy,—whether he swam to a distance and had not strength enough to regain the shore, or on going into the water got out of his depth:" 6 Hurl. & Nor. 839.

In *Fitton v. The Accidental Death Ins. Co.* an exception was inserted in the policy against liability for "hernia,

erysipelas, or any other disease or cause arising within the system of the assured before, or at the time, or following such accidental injury, whether causing death or disability directly or jointly with such accidental injury." It was held that death from strangulated hernia caused solely by external violence, followed by a surgical operation, performed for the relief of the patient, was not within the exception: 17 C. B. N. S. 122. Williams, J.: "It is to my mind merely a question whether the proviso at the end of the first condition, that the company does not insure against death or disability arising from hernia, means hernia generally, whether arising from external violence or arising within the system, or whether 'hernia' is governed by the other words 'or any other disease or cause arising within the system of the insured before, or at the time, or following such accidental injury.' * * Looking at the language of the policy, and taking the first condition all together, upon the best interpretation I can put upon it, I am of opinion that it means to exempt the company from liability only where hernia arises within the system. * * Hernia is not in all cases a disease arising within the system. It may or may not do so. I think the company are not relieved from responsibility where the hernia is caused by external violence."

Suicide committed during a fit of insanity has been held to be death resulting from disease: *Breasted v. Farmers' Loan and Ins. Co.*, 4 Seld. (N. Y. 1853) 299; *Eastbrook v. Union Mutual Ins. Co.*, 3 Virgin (Me. 1866) 224, *contra*; *Dean v. Am. Mutual Life Ins. Co.*, 4 Allen (Mass. 1862) 96.

*487]

* Ex parte ANDERSON.(a) Jan. 15.

The superior Courts of common law at Westminster have jurisdiction at common law to issue a writ of habeas corpus ad subjiciendum, to all parts of the dominions of the Crown of England, even to those in which an independent local judicature has been established. Such jurisdiction can be taken away only by express legislative enactment.

Accordingly, this Court granted a writ of habeas corpus directed to certain gaolers and others, in the province of Upper Canada, commanding them to bring up the body of A., a British subject, alleged to be illegally in their custody.

EDWIN JAMES moved that a writ of habeas corpus ad subjiciendum be issued to the sheriff of the county of York, in Canada, and to the keeper of the gaol of Toronto in that county, to bring up the body of John Anderson.

The motion was made on the affidavit of Louis Alexis Chamerovzow, of 27, New Broad Street, in the city of London, secretary of The British and Foreign Anti-Slavery Society; which stated that John Anderson, of the city of Toronto, in Her Majesty's province of Canada, a British subject domiciled there, was, as the deponent believed, illegally detained in the criminal gaol of the said city against his will, not having been legally accused, or charged with, or legally tried or sentenced for, the commission of any crime, or of any offence against or recognised by the laws in force in the said province, or in any part of Her Majesty's dominions; and not being otherwise liable to be imprisoned or detained under or by virtue of any such laws: and that, unless a peremptory writ of habeas corpus should immediately *issue, the life of the said John Anderson was exposed *488] to the greatest and to immediate danger.

Edwin James, for the writ.—The Crown, through the superior Courts at Westminster, has power to issue the prerogative mandatory writ of habeas corpus to any part of the Queen's dominions, and therefore to Canada. Stat. 14 G. 3, c. 83, "An Act for making more effectual provision for the government of the province of Quebec in North America," recites in the preamble that the "countries, territories, and islands in America," dealt with by the Act, were "ceded to His Majesty by the" "treaty of peace, concluded at Paris on 10th February, 1763"; and, by stat. 31 G. 3, c. 31, s. 2, the province of Quebec is divided into two separate provinces called the province of Upper Canada and the province of Lower Canada. [HILL, J.—I observe that stat. 14 G. 3, c. 83, enacted, by sect. 8, "that in all matters of controversy, relative to property and civil rights, resort" should "be had to the laws of Canada, as the rule for the decision of the same;" and, by sect. 11, that the criminal law of England was to be continued in force in the province.] There can be no doubt but that the writ of habeas corpus may issue to Canada. In delivering the judgment of this Court in *Leonard Watson's Case*, 9 A. & E. 731, 732 (E. C. L. R. vol. 36), Lord Denman, C. J. said, "The difficult questions that

(a) In consequence of the decision in this case it has since been enacted, by stat. 25 & 26 Vict. c. 20, s. 1, that no writ of habeas corpus shall issue out of England by authority of any Judge or Court of justice therein, into any colony or foreign dominion of the Crown where Her Majesty has a lawfully established Court or Courts of justice, having authority to grant and issue the said writ, and to insure the due execution thereof throughout such colony or dominion. Sect. 2 provides that the Act shall not affect or interfere with any legally existing right of appeal to Her Majesty in council.

may arise touching the enforcement in England of foreign laws, are excluded from this case entirely; for Upper Canada is neither a foreign state, nor a colony with any peculiar customs. Here are no mala prohibita by virtue of arbitrary enactments; the relation of master and slave *is not recognised as legal: but Acts of Parliament have [*489 declared that the law of England, and none other, shall there prevail." No precedent has been discovered of an actual issue of the writ to Canada; but no distinction exists, for this purpose, between that colony and any other part of the dominions of the Crown. In *Bac. Abr.*, tit. *Habeas Corpus*, (B.) 2, under the heading, "To what places it may be granted," the law is thus laid down: "It hath been already observed, that the writ of habeas corpus is a prerogative writ, and that therefore, by the common law, it lies to any part of the King's dominions; for the King ought to have an account why any of his subjects are imprisoned, and therefore no answer will satisfy the writ, but to return the cause with *paratum habeo corpus*, &c. Hence it was holden, that this writ lay to Calais at the time it was subject to the King of England." In delivering the judgment of the Court in *Rex v. Cowle*, 2 Burr. 884, 855, in which case the question was whether this Court had jurisdiction to issue a certiorari to Berwick-upon-Tweed, Lord Mansfield, C. J., said, "Writs, not ministerially directed (sometimes called prerogative writs, because they are supposed to issue on the part of the King), such as writs of mandamus, prohibition, habeas corpus, certiorari, are restrained by no clause in the constitution given to Berwick: upon a proper case, they may issue to every dominion of the Crown of England. There is no doubt as to the power of this Court; where the place is under the subjection of the Crown of England; the only question is, as to the propriety. To foreign dominions, which belong to a prince who succeeds to the throne of England, this *Court has no power to send any writ [*490 of any kind. We cannot send a habeas corpus to Scotland or to the Electorate: but to Ireland, the Isle of Man, the Plantations, and (as since the loss of the Duchy of Normandy, they have been considered as annexed to the Crown, in some respects), to Guernsey and Jersey, we may; and formerly, it lay to Calais; which was a conquest, and yielded to the Crown of England by the treaty of Bretigny." In 1397, a writ of habeas corpus, *testes per ipsum regem et concilium in parlamento*, was sent to the governor of Calais, to bring up the body of Thomas, Duke of Gloucester, then in custody there, to answer a charge of treason preferred against him by the Duke of Rutland and others. (a) [CROMPTON, J.—That was a writ *ad respondendum*, which is on a different footing from the writ *ad subjiendum*.] The following entry in 2 Peere Williams's Rep., p. 74, supports Lord Mansfield's statement, already cited, that the writ may go to the plantations. "Memorandum, 9th of August, 1722, it was said by the Master of the Rolls to have been determined by the Lords of the Privy Council, upon an appeal to the King in council from the

(a) *Bymer's Fœdera*, vol. 3, part 4, p. 135 (Hague edition, 1740). James also stated that he had found the following instances of writs having issued to Calais. A writ of *amoveas manus*, in 1363; of attachment, from the Court of King's Bench, against the mayor, for disobeying a writ, in 1364; and of inquisition, to inquire into the goods of a felon, in 1374.

foreign plantations, 1st, that if there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so, wherever they go, they carry their laws with them, and therefore such new found country is to be governed by the laws of England: though, after such country is inhabited by the English, *491] Acts of Parliament made in *England, without naming the foreign plantations, will not bind them." These dicta are in accordance with the general law of nations. Thus Vattel lays it down (a) that "when a nation takes possession of a distant country, and settles a colony there, that country, though separated from the principal establishment, or mother country, naturally becomes a part of the state, equally with its ancient possessions. Whenever, therefore, the political laws, or treaties, make no distinction between them, everything said of the territory of a nation must also extend to its colonies." In *Campbell v. Hall*, 1 Cowp. 204, 208, 210, Lord Mansfield, C. J., pointed out that it is clear that a country conquered by the British arms becomes subject to the Legislature of Great Britain; though the laws of such a country may be changed by the authority of the Crown. He gave as instances, amongst others, Berwick, Gascony, Guienne, Calais, and Minorca. [COCKBURN, C. J.—At the time of the decision in *Rex v. Cowle*, 2 Burr. 884, Berwick was not subject to the laws of Scotland. There was, consequently, no superior Court with power to control proceedings instituted there, unless the superior Courts of Westminster had jurisdiction to do so. BLACKBURN, J.—In the course of the judgment, Lord Mansfield, C. J., says, (b) "The charter gives them" (the corporation of Berwick) "power to make ordinances with penalties of fine and imprisonment: so as they be reasonable, and not repugnant to the laws, statutes, and customs of England. In short, they have no criminal law, but the *492] law of England; and no criminal *jurisdiction, but with such a reference to the law of England, as necessarily includes this Court." Can the same be said of Canada? COCKBURN, C. J.—Canada possesses an independent Legislature and an independent judicature. CROMPTON, J.—You must make out that we have concurrent jurisdiction with the superior Courts of Canada.] The mere fact that the Crown has granted a local judicature to a colony, with the same jurisdiction, within the colony, that the superior Courts of England have over the whole of the realm, does not, in the absence of express enactment to the contrary, oust the Crown of its right to control the local Courts in the exercise of their jurisdiction. There is a local judicature in Ireland; but, in *Anonymous*, Vent. 357, the Court seemed to be of opinion that a habeas corpus might be sent to Ireland to remove a person taken in execution upon a judgment there. [HILL, J.—At that time an appeal lay from Ireland to this Court. But appeals from the colonies lie only to the Queen in Council.] There are several instances in which the jurisdiction of the English superior Courts to issue a habeas corpus to the foreign dominions of the Crown has been considered. In *Crawford's Case*, 13 Q. B. 613 (E. C. L. R. vol. 66), this Court appears to have thought that the writ, *ad subjiciendum*, runs at common law to the Isle of Man; at any rate

(a) Law of Nations, book 1, ch. 18, sect. 210, p. 100 (Chitty's edition, 1834).

(b) 2 Burr. 855.

since stat. 5 G. 3, c. 26, by which the island was vested inalienably in the King and his successors, as part of the dominions of the Crown of England. In *Ex parte Lee*, E. B. & E. 828 (E. C. L. R. vol. 96), the Court refused a writ of error to bring up the record of the conviction of the prisoner for a criminal offence, by the Supreme Court of St. Helena, on the ground that the Attorney-General's fiat for the writ had not been obtained. Crompton, J., however, *afterwards granted a writ of habeas corpus in that case. [*493] [CROMPTON, J.—I granted the writ as ancillary to the writ of error, which the Crown had afterwards allowed to issue. COCKBURN, C. J.—At the time of the argument of the question whether the writ of error ought to be granted, the Court seems to have doubted whether a writ of habeas corpus could issue to St. Helena. In delivering the judgment of the Court, Lord Campbell, C. J., says, E. B. & E. 834 (E. C. L. R. vol. 96), "No precedent" "of any such proceeding" as a writ of error or certiorari "with respect to a dependency like St. Helena, for several centuries, was brought before us; and it was not at all explained in what manner our writs of error, certiorari or habeas corpus would be enforced in such dependencies." It has been decided that the writ of habeas corpus ad subjiciendum runs to Jersey: *Carus Wilson's Case*, 7 Q. B. 984 (E. C. L. R. vol. 53); *Dodd's Case*, 2 De G. & J. 510. [HILL, J.—Suppose that we issue the writ in the present case, and that the parties to whom it is directed refuse to obey it, what remedy should we have?] The writ might then be enforced by attachment. [HILL, J.—Could we send our own officer to Canada for that purpose?] Yes, if necessary: and the attachment would be valid. The same difficulty, if it be one, would arise in the case of an issue of the writ to Jersey. In the case before the Court the interests of a British subject are vitally affected. The Court will not, therefore, refuse to exercise, in his favour, a jurisdiction warranted by numerous precedents, merely on the ground that there may be difficulty in enforcing the writ, when granted.

*The COURT(a) retired for consultation. On their return, [*494] Cockburn, C. J., delivered judgment as follows.

We have considered this matter; and the result of our anxious deliberation is, that we think the writ ought to issue. At the same time, we are sensible of the inconvenience which may result from such a step; and that it may be felt to be inconsistent with that higher degree of colonial independence, both legislative and judicial, which happily exists in modern times. Nevertheless, it is to be observed that, in establishing a local judicature in Canada, our Legislature has not gone so far as expressly to abrogate the right of the superior Courts at Westminster to issue the writ of habeas corpus to that province; which writ, in the absence of any prohibitive enactment, goes to all parts of the Queen's dominions. Lord Coke,(b) Lord Mansfield,(c) Blackstone,(d) and Bacon's Abridgment,(e) all agree that writs of habeas corpus have been and may be issued into all parts of

(a) Cockburn, C. J., Crompton, Hill and Blackburn, Js.

(b) See *Calvin's Case*, 7 Rep. 20 a.

(c) In *Rex v. Cowle*, 2 Burr. 834, 855.

(d) *Commentaries*, vol. 3, p. 131.

(e) *Tit. Habeas Corpus* (B) 2.

the dominions of the Crown of England, wherever a subject of the Crown is illegally imprisoned or kept in custody. In addition to these dicta of eminent authorities, we have actual precedents of the issue of the writ, in very modern times, into the Islands of Man, Jersey, and St. Helena. Inasmuch, therefore, as the power of this court thus to issue the writ has been not merely asserted as matter of doctrine, but carried into effect in practice; and as the writ has issued even into dominions of the Crown in which there is an independent local judicature; we think that nothing short of *495] *legislative enactment would justify us in refusing to exercise the jurisdiction, when called upon to do so for the protection of the personal liberty of the subject. It may be that the Imperial Legislature has thought fit to leave the three superior Courts at Westminster the same concurrent jurisdiction in this matter with the colonial Courts that they have inter se. Both upon authority and upon precedent, we think that the writ ought to go.

Writ of habeas corpus granted.(a)

(a) The writ was directed to the sheriff of the county of York, in Canada, in Her Majesty's province of British North America, and the keeper of the gaol in the city of Toronto, in the said county; to the sheriff of the county of Brant, in Canada aforesaid, and to the keeper of the gaol in the town of Brantford, in the said county; and to all other sheriffs, gaolers, and all constables and others in the said province, having the custody or control of the said John Anderson.

MOURILYAN v. LABALMONDIERE. Jan. 16.

(Reported, 1 E. & E. 533.)

MILVAIN and Another v. PEREZ and Others. Jan. 18.

By a charter-party made between plaintiffs, shipowners, and defendants, agents in England for foreign charterers, it was agreed that plaintiffs' ship the B. should proceed to J., and there load in regular turn, in the customary manner, from defendants, a full and complete cargo of coke. It was further agreed that, as defendants were acting for foreign principals, "all liability of" defendants "in every respect, and as to all matters and things, as well before and during as after the shipping of the said cargo," should "cease as soon as they" had "shipped the cargo."

Defendants having loaded and shipped the agreed cargo, plaintiffs afterwards sued them in this action for not having shipped it in regular turn. Held, that the action would not lie, for that the charter-party limited defendants' liability to the actual shipment of the cargo, and protected them from responsibility for any irregularity or delay in the shipment.

DECLARATION, upon a charter-party made between plaintiffs and *496] defendants. The charter-party, *which was set out in full, was, so far as is material, as follows.

"It is this day mutually agreed between Henry Milvain, Esquire," (meaning plaintiffs), "owner of the good ship or vessel called the Bomarsund," "now in the Tyne, and Messieurs. Perez, Williams & Bilton" (meaning defendants,) "as agents for the charterers, that the said ship, being tight, staunch and strong, and every way fitted for the voyage, shall proceed to Ramsey's Coke Ovens at Jarrow, and there load in regular turn, in the customary manner, from the agents

of the said charterers (except in case of riots, strikes, or any other accidents beyond their control, which may prevent or delay her loading), a full and complete cargo of coke;" "and being so loaded shall therewith proceed to Carthagena for orders to discharge there, at Escombreras or Porman, and there discharge the cargo upon being paid freight." "The vessel to be consigned to the charterers' agents at port of discharge, and to pay the usual commission of two per cent." "This charter being concluded by Messieurs Perez, Williams & Bilton, on behalf of another party resident abroad, it is agreed that all liability of the former in every respect, and as to all matters and things, as well before and during as after the shipping of the said cargo, shall cease as soon as they have shipped the cargo; and, further, that the vessel shall be cleared at the custom house by them." The declaration then made the following averments. That the charter-party was signed by defendants in these words, "Perez, Williams & Bilton, agents;" that the ship did proceed to the said Ramsey's Coke Ovens at Jarrow, and there were no riots, strikes, or any other accidents beyond defendants' control, which prevented or delayed the loading *of the said cargo as agreed; and that plaintiffs were always [*497 ready and willing to do, and did, all things necessary to oblige defendants to load the said cargo, as agreed, and to entitle plaintiffs to have the said cargo loaded as agreed; and all things happened which were necessary to happen to oblige defendants to load the said cargo as agreed, and nothing ever happened to excuse defendants from loading the said cargo as agreed; of all which premises defendants always had notice, and the time for defendants' loading the said cargo as agreed elapsed before suit. Breaches: That defendants did not load the said cargo as agreed; that they made default in loading such cargo for a long and unreasonable time; and that they did not load the said ship with such cargo, in regular turn, in the customary manner.

Plea. That the said charter-party was in fact made by defendants as agents on behalf of another party, resident abroad, to wit, Gregorio de Bayo, of Carthagena, in Spain, and that the said agreed cargo was loaded and shipped and the said vessel was cleared by defendants at the custom-house, before the commencement of this suit: and thereupon all liability of defendants in every respect under and to the performance of the said charter-party, and to damages sustained by plaintiffs by the non-performance thereof, ceased.

Demurrer. Joinder in demurrer.

T. Jones (Northern Circuit), in support of the demurrer.—The plea is bad. It admits all the breaches assigned in the declaration, the last of which, namely, that the defendants did not load the cargo in regular turn, is the most material. If the defendants loaded the cargo out of the regular turn, they are answerable to the *plaintiffs [*498 for the damage thence ensuing; and are not protected by the clause in the charter-party which provides that their liability is to cease as soon as they have shipped the cargo. The protection does not extend to relieve them from liability for a shipment not in accordance with the stipulations of the charter-party. [CROMPTON, J.—You give no effect to the words "as well before and during as after the shipping of the said cargo." Do they not import that, if the ship is actually loaded by the defendants, they are not to be liable for

anything occurring in the course of loading?] No. The meaning is, that they are not to be liable for anything which occurs during the loading of the ship in regular turn, provided she is so loaded. The effect is the same as if the charter-party had contained a stipulation that the ship should be loaded on a named day; the 1st January, for instance. If so, would the defendants have been protected, had they delayed the loading for several subsequent days? Under the charter-party, as actually framed, could they justify loading the ship whenever they pleased; and after a delay however great? [HILL, J.—Perhaps your argument might have had some foundation, if a specific day had been named for the loading.] The stipulation that the ship should be loaded in regular turn is in principle the same thing. Any other construction of the charter-party, taken as a whole, leaves the plaintiffs remediless. The question is, to what extent have the defendants limited their liability: *Oglesby v. Yglesias*, E. B. & E. 930 (E. C. L. R. vol. 96).

Manisty, Q. C., was not called upon.

*499] *COCKBURN, C. J.—This is a very clear case. The defendants, expressly stipulated that their liability in every respect, and as to all matters and things, as well before and during, as after, the shipping of the cargo, should cease as soon as they had shipped the cargo. It is now sought to make them liable for not loading the cargo in regular turn. But their neglect, if any, in so doing, must fall under the head of some matter or thing done before and during the shipping of the cargo. Possibly the defendants felt the necessity for having a stringent protecting clause inserted in the charter-party. They had a perfect right to protect themselves to the fullest extent; and, they having done so, it is evident that the shipowner cannot now hold them responsible.

(WIGHTMAN, J., was absent.)

CROMPTON, J.—I am of the same opinion. The defendants, knowing, no doubt, that persons entering into charter-parties merely as agents for others are often held personally liable upon them, have said in effect to the plaintiffs, in the charter-party before us; "Inasmuch as we are acting for a foreign principal, we will accept no further liability than this: If the ship is not loaded, we will be responsible; but, once she is loaded, we will not be liable in respect of anything that may happen before, during, or after, the loading." The stipulation is, that the defendants' liability shall cease "as soon as they have shipped the cargo;" and the only question is, what is the meaning of those words. They clearly refer to the fact only, and not to the time or manner, of *shipment. If the argument for *500] the plaintiffs were well founded, the defendants would be liable for everything that occurred, either before, during, or after, the loading, if the loading was not in regular turn. But it is evident that the defendants were not to be in any way responsible, provided the loading took place under the contract; although the cargo might be shipped a day or two later than was regular.

HILL, J.—I am of the same opinion. The parties were at liberty to make what contract they pleased; and it is the duty of the Court to construe the contract actually made, according to their intention

Oglesby v. Yglesias, E. B. & E. 930 (E. C. L. R. vol. 96), shows that it was competent to the defendants to stipulate that they should not be liable for anything occurring before, during, or after the shipping of the cargo; provided that they shipped it. In the present case the plaintiffs, admitting that the defendants have shipped the cargo, say that it was shipped too late, not having been shipped in regular turn. The defendants have, however, by plain words in the charter-party, to be construed according to their plain meaning, protected themselves from all liability on that account; and the only person responsible to the plaintiffs is the defendants' foreign principal.

Judgment for defendants.

*The QUEEN, on the prosecution of the Committee of Justices of the Peace for the County of Northumberland, appointed [*501 under stat. 15 & 16 Vict. c. 81, for the purpose of preparing a basis or standard for fair and equal County rates in the said County, Appellants, and THOMAS DOUBLEDAY, Respondent. Jan. 19.

Stat. 15 & 16 Vict. c. 81, by sect. 2, empowers the justices of a county to appoint a committee of their body for the purpose of preparing a basis or standard for fair and equal county rates, to be founded on the full and fair annual value (interpreted by sect. 6 to mean the net annual value) of the property rateable to the poor-rate in every parish in the county. Sect. 5 empowers this committee to order, in writing, certain specified parish officers and other persons, having the custody or management of any public or parochial rates or valuations of the parishes, to make written returns to the committee of the amount of the full and fair annual value of the property in any parish liable to be assessed toward the county rate; the date of the last valuation for the assessment of such parish; and the name of the surveyor or other person by whom such valuation was made. By sect. 7 the committee may, by their order in writing, require the "overseers of the poor, constables, assessors, collectors, and any other persons whomsoever, to appear before them," "and to produce all parochial and other rates, assessments, valuations, apportionments, and other documents in their custody or power relating to the value of or assessment on all or any of the property within the several parishes" "which may be liable to be assessed toward the county rate, and to be examined on oath" "touching the said rates, assessments, valuations, or apportionments, or the value of property aforesaid." By sect. 8, "every person who shall neglect or refuse to appear when required so to do as aforesaid, or to be sworn or examined, or to produce such documents as hereinbefore provided," is subjected to a penalty not exceeding 20*l.*, recoverable before justices.

Held, that sect. 7 authorizes the committee to call before them all persons whomsoever, able to give evidence of, and produce any documents relating to, the actual annual value of the property to be assessed to the county rate; and does not restrict the committee to ascertaining, by the examination of the persons, and the inspection of the documents, specified in sect. 5, the amount at which the property is rated to the poor-rate. That therefore a person having in his possession private accounts and documents relating to the annual value of collieries and coal-mines assessable to the county rate, and able to give evidence touching their net annual value, incurs the penalty under sect. 8 by refusing to obey an order of the committee, under sect. 7, for his appearance before them with such accounts and documents.

CASE stated, under stat. 20 and 21 Vict. c. 43, by justices of Northumberland in Petty Sessions.

An information was laid by William Dickson, of Alnwick, in the county of Northumberland, clerk to the *committee of justices of the peace for the said county, appointed under stat. 15 & 16 [*502 Vict. c. 81, for the purpose of preparing a basis or standard for fair and equal county rates in the said county, duly authorized in that behalf, and acting by the order and for and on behalf of the said com-

mittee: who complained that Thomas Doubleday, of Newcastle-upon-Tyne, Esquire (the respondent), having been required by an order in writing of the Committee, signed by the said William Dickson, as their clerk and by their order, and duly served upon him, to appear before the said committee on the 4th day of April, 1860, at the Court House at Morpeth, in the said county, at 12 o'clock at noon, and then and there to produce before them all accounts of receipts and expenditure, and all other documents in his custody or power relating to the value of certain collieries and coal mines in the east division of Castle Ward, in the said county, to wit, Backworth colliery, Seghill colliery, and Burradon colliery, such collieries and coal mines being property in the several parishes within the said division, liable to be assessed towards the county rate; and to be examined on oath, and answer such questions as the said committee might put to him respecting the said several collieries and coal mines, so that, with the aid of the returns from the parochial and other rates then in the custody of the said committee, they might be enabled more correctly to arrive at the true rateable value of such collieries and coal mines; did unlawfully, and without any reasonable excuse, neglect to appear before the said committee accordingly, contrary to the form of the statute in such case made and provided.

This information was laid under stat. 15 and 16 Vict. c. 81, s. 8.

*503] *The prosecutors (that is to say, the said committee by William Dickson their clerk) and the respondent (hereinafter called the defendant), having been duly summoned, appeared at the hearing.

The facts were admitted by the defendant to be correctly laid in the information. It was also admitted by him that he had in his possession private accounts and documents relating to the annual value of the collieries and coal mines in the information mentioned, and that he was able to give evidence touching the net annual value; but he declined to produce the said documents, or to give the required evidence.

: It was admitted by the prosecutors that the defendant was not an overseer of the poor, a constable, an assessor, or collector of public rates of or for any parish, township, borough, or place within the county; and that he was not a person having the custody or arrangement of any public or parochial rates or valuations of any such parish, township, borough, or place, within the county. It was also admitted by the prosecutors that the defendant had not in his custody or power any parochial or other rates, assessments, valuations, apportionments, or other documents relating to the value or assessment on all or any of the property with respect to which he was required to give evidence. And further, that any documents in the defendant's possession or information, relating to the subject-matter of the inquiry, were so solely in his private capacity.

On the part of the said committee, it was contended that they have the power to require the owners and lessees of collieries and land, and any other person or persons whosoever, to appear before them and to produce their private accounts, or other documents of a like nature, in their custody or power, relating to (that is, calculated to show) the net annual value of any property in the

*504]

county rateable to the relief of the poor; and that the expression "any other persons whomsoever," in the 7th section of the Act, is not confined or limited to persons, being public officers, having the custody of parochial and such like documents. That the primary object of the statute is to enable the committee to prepare a basis or standard for fair and equal county rates; the same to be prepared rateably and equally, according to the full and fair annual value of the property rateable to the relief of the poor. That, by section 6, the words "full and fair annual value" are to be taken to mean the net annual value of the property. That, to enable the committee to arrive at and ascertain that value, very extensive powers are given to them by sections 5 and 7, including the power to call before them "any persons whomsoever," to produce documents and to be examined upon oath touching the value of the property to be assessed. That, if it be said that the expression "any persons whomsoever," in the 7th section, must be construed to mean any persons of a public or quasi public character, such as constables and others mentioned in the Act, the answer to that argument is two-fold. First, the object of the Legislature requires a more liberal construction of the words; and, secondly, the marked difference between the language used in the fifth section (which is confined to persons of a public or quasi public character) and that used in the 7th section, clearly shows that the intention of the Legislature was to confer upon the committee the power of calling for private accounts, and examining private individuals with reference to the net annual value of any of the rateable property in the county.

*It was also contended by the said committee, that, in the case of collieries, the overseers have no means of ascertaining the rents paid by the lessees, or of ascertaining what additional annual value should be put upon the collieries in respect of things affixed and giving additional value to the freehold (such as wagon ways, &c.), and such information can only be obtained by the examination of the owners or lessees of the collieries, or their agents, and by compelling them to produce such documents as are in their possession or power relating to the net annual value of the property in question. [505]

On the other hand it was contended, on the part of the defendant, that the committee have not the power to require him to appear before them and produce his private accounts, or other documents of a like nature, relating to the value of any property liable to be assessed to the county rate, and to examine him on oath and compel him to answer questions touching the value of property.

The justices' view of the provisions of the statute coinciding with that of the defendant, they dismissed the information.

If the Court should be of opinion that this determination was wrong, the justices requested that the matter might be remitted to them, with the opinion of the Court thereon accordingly; or that the Court would make such other order in relation to the matter as to the Court should seem meet.

Mamety, for the appellants.—The justices were wrong in dismissing the information. The words "any persons whomsoever," in stat. 15 & 16 Vict. c. 81, s. 7, are to be read in their natural sense, and not

*506] to be restricted *to the public officials mentioned in sect. 5. The Act, by section 2, provides for the appointment by justices in Quarter Sessions of a committee of justices "for the purpose of preparing a basis or standard for fair and equal county rates, such basis or standard to be founded and prepared rateably and equally according to the full and fair annual value of the property, messuages, lands, tenements, and hereditaments rateable to the relief of the poor in every parish, township, borough, or place," within the limits of the justices' commissions. Then sect. 5 enacts that, "For the purpose of preparing such basis or standard for fair and equal county rates the said committee, by their order in writing, to be signed by their clerk, may from time to time, as often as they may deem it necessary, direct the overseers of the poor, constables, assessors, and collectors of public rates of or for any parish, township, borough, or place within the county, and all other persons having the custody or management of any public or parochial rates or valuations of any such parish, township, or place, to make returns in writing to the said committee, at such times and places as they may appoint, of the amount of the full and fair annual value of the whole or of any part of the property within the parish, township, or place liable to be assessed towards the county rate, together with the date of the last valuation for the assessment of such parish, and the name of the surveyor, or if no surveyor, then the name or names of the person or persons by whom and the manner in which the said valuation was made." By sect. 6, "For the purposes of preparing any such basis or standard for assessing any county rate, the words 'full and fair annual value' shall be taken to mean the net annual value of any property as the same is or may be

*507] *required by law to be estimated for the purpose of assessing the rates for the relief of the poor." Then sect. 7 enacts that "The said committee may from time to time, as often as they may deem it necessary, by their order in writing, signed as aforesaid, require the said overseers of the poor, constables, assessors, collectors, and any other persons whomsoever, to appear before them, when and where and as often as the said committee may deem expedient, and to produce all parochial and other rates, assessments, valuations, apportionments, and other documents in their custody or power relating to the value of or assessment on all or any of the property within the several parishes and places aforesaid which may be liable to be assessed toward the county rate, and to be examined on oath, and answer such questions as the said committee may put to them respectively touching the said rates, assessments, valuations, or apportionments, or the value of the property aforesaid." And, by sect. 8, "Every overseer of the poor, constable, assessor, collector, or other person so required to make returns, or to appear as aforesaid, who shall, without any reasonable excuse, neglect to make such returns in writing as aforesaid, or wilfully make any false return, and every person who shall neglect or refuse to appear when required so to do as aforesaid, or to be sworn and examined, or to produce such documents as hereinbefore provided, shall forfeit a sum not exceeding 20*l.*, to be prosecuted for and recovered by order of the said committee before any two "justices." A comparison of these clauses with those of stat. 55 G. 3, c. 51, one of the Acts repealed by stat. 15 & 16 Vict. c.

81, s. 1, shows how much more extensive are the powers conferred upon the justices by the later Act. *Stat. 55 G. 3, c. 51, s. 2, [*508 corresponds, in substance, with stat. 15 & 16 Vict. c. 81, s. 5. But sect. 9 of the earlier Act, which answers to sect. 7 of the later, while it empowers the justices to call for the books of assessment of any rates or taxes, parliamentary or parochial, in the hands of any constable, churchwarden, overseer, assessor or collector, and to take copies thereof, authorizes them "to call before them any such constable, churchwarden, overseer, assessor or collector, to give evidence respecting the same;" whereas sect. 7 of stat. 15 & 16 Vict. c. 81, empowers the committee of justices, constituted under that Act, to require to appear before them, not only the parochial officers, but "any other persons whomsoever;" and to require such persons to produce, not only the parochial and other rates and assessments, but all other documents in their custody or power relating to the value of or assessment on all or any of the property liable to be assessed to the county rate, and to be examined respecting not only the rates, &c., but also the value of the property. The object of the Legislature, in this enactment, clearly was to enable the committee to obtain evidence from other than official quarters as to the real rateable annual value of such property as might be of a higher annual value than the amount at which it was rated to the poor-rate by the parish officers. The annual rent which a tenant pays or would pay for the property is the criterion of the rateable value of the property to the poor-rate; *Rex v. Chaplin*, 1 B. & Ad. 926 (E. C. L. R. vol. 20), *Allison v. Overseers of Monkwearmouth Shore*, 4 E. & B. 18 (E. C. L. R. vol. 82): but such property as collieries and coal mines may well be of higher value than the mere rent paid for them; and assessable *to the county rate accordingly. In giving the committee of justices [*509 power to call for the best evidence of the value of property the Legislature has but pursued the policy before adopted in the case of railway Companies, which, by The Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, s. 107, may be required to transmit to the overseers of the poor of the parishes, and to the clerks of the peace of the counties through which their line passes, an annual account of their total receipts and expenditure for the year, and a statement of the balance. [CROMPTON, J.—No power is given by that Act to the churchwardens and overseers to call before them railway directors, to give evidence of the value of the line. However, it does not follow that the Legislature may not, by the Act now before us, have intrusted the committee of justices with the powers for which you are contending.]

Mellish, for the respondent.—It would require very strong and express words in the Act, to give the appellants the inquisitorial power which they claim. The object of the Act was that the committee of justices should ascertain, generally, whether any parish was rated to the county rate fairly or unfairly in proportion to other parishes, so that, if inequality in the assessment existed, it might be redressed. A common interest in all the parishioners to keep down the amount of the assessment might have induced a particular parish to rate the property within it below its value, in order to keep down its contribution to the county rate: and that was the mischief which the Legislature sought to remedy. The power to appeal against the

basis of assessment to the county rate, given by stat. 15 & 16 Vict. c. 81, s. 17, both to parish officers and inhabitant parishioners, obviates *510] the necessity for "great strictness in the establishment of the basis in the first instance. Sect. 7 was intended merely to give effect to the provisions of sect. 5, by empowering the committee to call before them and examine the persons from whom sect. 5 authorizes them to require returns of the annual value of property. The words "any other persons whomsoever" in sect. 7 relate exclusively to the persons who are specified in sect. 5, in addition to those specified again in sect. 7: namely "all other persons having the custody or management of any public or parochial rates or valuations of any" "parish, township, or place." That this is so is shown by the further provision, in sect. 7, that the persons summoned before the committee are "to produce all parochial and other rates, assessments, valuations, apportionments, and other documents in their custody or power relating to the value of or assessment on all or any of the property within the several parishes" "which may be liable to be assessed toward the county rate." The "value" here spoken of, must mean the value as shown by the assessment. Again, the words "any other persons whomsoever," in sect. 7, cannot have a wider application than the words "other persons" in sect. 10; by which section parishes in which "overseers or other persons neglect to make" the "return in writing," required by sect. 5, are made liable to the expenses incurred in consequence by the committee in making the valuations. In both sections, by "other persons" are clearly meant the persons who, in addition to the overseers, are to be required, under sect. 5, to make the return. At all events, "any other persons whomsoever," in sect. 7, must refer to persons only who are ejusdem generis with those particularly mentioned, namely, *511] "overseers of the poor, constables, assessors," and "collectors." No argument can be drawn from a comparison of the language of the corresponding sections in stat. 55 G. 3, c. 51. Sect. 2 of that Act, which answers to sect. 5 of stat. 15 & 16 Vict. c. 81, specifies all the persons from whom the justices may require returns; and contains no such general reference to all other persons having the custody or management of rates or valuations as is found in section 5 of the later Act. In the earlier Act, therefore, no such reference was necessary in sect. 9, which related to sect. 2; but such a reference was necessary in sect. 7 of the later Act, by reason of the language of its 5th section. Nor is the contention on the other side fortified by the enactment in the Railways Clauses Consolidation Act, 1845, s. 107; by which railway Companies are required to make out and transmit to the overseers an annual account of their receipts and expenditure; although their case would have been in point had the Legislature gone further, and given the poor-rate assessors power to compel the officials of the Companies to attend with their books and give evidence of the annual value of their property. The power claimed for the appellants exceeds in stringency any conferred by the Income Tax Acts on the assessors to that tax.

Manisty was heard in reply.

: (COOKBURN, C. J., and WIGHTMAN, J., were absent.)

: CROMPTON, J.—I am of opinion that the justices came to a wrong decision. Stat. 15 & 16 Vict. c. 81 gives new powers to the justices

of counties to take steps for preparing a basis or standard for fair and equal county *rates. This basis or standard is intended to be lasting; although there may be an appeal against it when [*512 allowed. Owing to the importance of having it carefully adjusted, a committee of justices is to be appointed for the purpose. I agree with Mr. Mellish as to the object of the Act, and the duty of the committee; namely, to ascertain whether the property in the several parishes is rated to the relief of the poor according to its full and fair annual value; and not arbitrarily, or at an amount much below that value. Sect. 6 shows that by "full and fair annual value" is to be understood the net annual value, as the same is required by law to be estimated for the purpose of assessing the poor-rates. By sect. 5 the committee are empowered to procure returns of the rates and valuations: but their duty is to ascertain the difference between the actual assessment and the actual annual value of property. I do not see how this difference can be ascertained otherwise than by taking evidence as to the actual annual value; which, in many cases, will not be shown by the assessment. Overseers, for instance, may admit, on examination, that the property in their parish is not rated at its full and fair annual value. It is necessary, therefore, that the committee should have further means than an inspection of the rates for ascertaining the value of property. If, now, we turn to sect. 7 of the Act, its language is very strong; and, taken in the literal sense, clearly empowers the committee to summon before them everybody, whether private individual or parochial officer, who can give any evidence as to the real annual value of the property in parishes. Without some power of this kind the committee would not be able to pursue their investigations and arrive at a satisfactory result. *It may be an in- [*513 quisitorial power, and liable to abuse; but great inconvenience would result from its absence. To advert again to the language of the Act. By sect. 5 the overseers and others, who are to be called upon to make returns, are to return, inter alia, the name of the surveyor, or the name or names of the person or persons by whom, and the manner in which, the valuation was made. Now the surveyor or other person would not necessarily be a public officer, and, unless under the words "any other persons whomsoever" in sect. 7, the committee would have no power to take their evidence. These words are extremely wide. I should be unwilling to strain doubtful language in a matter of this kind; but it would be straining plain language to hold that "whomsoever" refers only to persons mentioned in the Act. Moreover, the section goes on to provide that the witnesses are to produce, not only all parochial and other rates and assessments, but also other documents in their custody or power, relating to the value of the property. It, therefore, appears to me that the Legislature have intentionally given power to this committee of gentlemen to exercise this somewhat arbitrary jurisdiction, if necessary; guarding its exercise by the requirement that the witnesses are to be summoned by the order in writing of the committee, which, it is to be assumed, will not be issued vexatiously and without due reason. Although I entertained some doubts in the course of the argument, I have now come clearly to the conclusion that the justices were wrong.

HILL, J.—I am of the same opinion. The question is, whether we

are to construe the words in sect. 7, "any other persons whomsoever,"
 *514] according to their *plain general acceptance, or are to limit them to such persons as are mentioned in the 5th section, and have in their custody or power such documents as are there specified. After hearing the argument on both sides, and on full consideration, I am clearly of opinion that we must give to the words their plain and general meaning. The intention of the Legislature must be ascertained from the words of a statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the statute: *Fordyce v. Bridges*, 1 H. L. Ca. 1. The statute before us, after repealing former Acts, enacts by sect. 2 that it shall be lawful for justices in Quarter Sessions, as often as they may deem it necessary, to appoint a committee of their body "for the purpose of preparing a basis or standard for fair and equal county rates, such basis or standard to be founded and prepared rateably and equally according to the full and fair annual value of the property" "rateable to the relief of the poor in every parish, township, borough, or place." These words show that the object of the Legislature was that the basis or standard for the county rates should be founded on the full and fair annual value of the property to be assessed; and not solely on the amount at which such property was actually assessed to the poor-rate. It is, therefore, of the greatest importance that the statute should receive a construction which will give effect to this object. By sect. 5 the duty is imposed upon certain specified public officers, of making certain written returns, when required by the committee. Mr. Mellish has attempted to account for the introduction of the words
 *515] "other persons" in sect. 7 *by supposing them to relate to such of these officers as are not expressly mentioned in that section. But, as my brother Crompton has pointed out, one of the duties imposed by sect. 5 on the officers there specified is to return to the committee the name of the surveyor who makes the valuation. It must evidently have been intended that the committee should refer to this surveyor, if necessary, for further information; but if Mr. Mellish's construction of sect. 7 is correct, they would have no power to summon him before them. The reasonable construction of sect. 7 is that it is intended to enlarge the powers already given to the committee by sect. 5, by authorizing them to call before them, not the persons, only, enumerated in sect. 5, but also "any other persons whomsoever;" and to compel the production by the witnesses, not only of the parochial and other rates, assessments, valuations and apportionments, but also of all other documents which any witness may have in his custody or power, and which relate to the true value of the property. No other documents but those which are of that nature can be called for; and such documents are most material to the due exercise of the duty of the committee. The section, further, gives the committee power to examine the witnesses on oath, touching either the rates, assessments, valuations and apportionments, or the value of the property. It may be said that these powers are to a certain extent inquisitorial; but I see nothing absurd or oppressive in the committee being invested with authority to acquire the best information available. Sect. 13 enacts that a copy of the basis or standard, when prepared, is to be sent to every parish, and submitted to

its vestry ; by sect. 14, objections to the basis or standard may be sent to the *committee, either by the parish officers, or by any person affected by it ; and by sect. 17 it may, after its allowance, be [*516 appealed against to Quarter Sessions, by any parish officer or inhabitant parishioner, on wide and various grounds there enumerated. The Act, therefore, providing so many safeguards against an abuse of their powers by the committee, I see nothing unreasonable, unjust, or improper in giving to the words of sect. 7, "any other persons whomsoever," their plain general meaning, according to which they include the respondent in the present case. I am, consequently, of opinion that the justices came to a wrong decision. The case must be remitted to them with that expression of our opinion.

Appeal allowed, without costs ; and case remitted to the justices.

WALSBY, Appellant, v. ANLEY, Respondent. Jan. 19.

Stat. 6 G. 4, c. 129, s. 3, constitutes it an offence punishable by conviction, "by threats or intimidation, or by molesting or in any way obstructing another," to "force or endeavour to force any" "person engaged in carrying on any trade or business," "to limit" "the number or description of his" "workmen."

Held, that a threat by a workman to his employer, made in pursuance of a combination (which is illegal) between that workman and fellow-workmen to carry it out, that all the workmen so combining will immediately leave work unless the employer discharges other workmen who are then in the same service, renders such workman liable to conviction for the above offence.

CASE stated by a Metropolitan Police Magistrate, under stat. 20 & 21 Vict. c. 43.

On 9th June, 1860, the appellant was convicted by the magistrate, under stat. 6 G. 4, c. 129, s. 3, for unlawfully, on 16th May, 1860, within the Metropolitan police district, in the county of Middlesex, by threats endeavouring to force the respondent, then and there *carrying on the trade of a builder, to limit the description of [*517 his workmen ; and was ordered to be imprisoned for one calendar month, with hard labour.

It was proved, by the respondent and other witnesses, that the respondent carried on the trade of a builder in Whitecross Street, Middlesex, and that he employed about a hundred workmen. In the year 1859 there had been a strike of workmen employed in the building trade, and the respondent then resolved not to employ, and did not employ for some time, any workmen who declined to work under what was called the declaration. It was well understood in the building trade what this declaration was ; it being to the following effect. "I declare that I am not now, nor will I during my engagement with you become, a member of, or support, any society which directly or indirectly interferes with the arrangements of this or any other establishment, or the hours or terms of labour ; and that I recognise the right of employers and employed individually to make any trade engagements on which they may choose to agree."

On the day named in the conviction the respondent had in his employment two or more men working under this declaration. On that day the defendant and two of the other workmen brought to the

respondent a paper signed by the defendant and about thirty other workmen, of which the following is a copy. "At a meeting of the joiners in the employ of Mr. Anley, Tuesday evening, May 15th, 1860, it was resolved, that Mr. Anley be given to understand that, unless the men who are working under the declaration in his shop be discharged, and we have a definite answer by dinner time to that *518] effect, we cease work immediately." The appellant, in reply to questions thereupon put by the respondent, said that he and the other workmen had no fault to find with the respondent, his foreman, or clerks; nor had he (the appellant) any fault to find with the wages he received; and when the respondent inquired what it was he wanted, the appellant answered, "You must discharge those two men who are working under the declaration; and if you do not, we will leave work." The respondent answered, "I will not be dictated to; and I will rather close my shop than submit to your dictation." On the same day the defendant and all the workmen who had signed the paper left the respondent's employment, and had not returned up to the time of the conviction.

It was contended by the counsel for the appellant that what his client had done was not a threat, within the meaning of the Act of Parliament; but the magistrate, being of opinion that it was an offence under the Act, convicted the appellant.

The question for the opinion of the Court was, Whether this determination was erroneous in point of law.

H. S. Giffard, for the respondent.—There was sufficient evidence before the magistrate to warrant him in convicting the appellant. The whole question is, whether what was said by the appellant to the respondent on the day named in the conviction could in law amount to a threat within the meaning of stat. 6 G. 4, c. 129, s. 3, which renders liable to conviction "any person" who "shall by violence to the person or property of another, or by threats or intimidation, or *519] endeavour to force any manufacturer or person engaged in carrying on any trade or business, to make any alteration in his mode of regulating, managing, conducting, or carrying on such manufacture, trade, or business, or to limit the number of his apprentices, or the number or description of his journeymen, workmen, or servants." The appellant's statement to the respondent, "You must discharge those two men who are working under the declaration; and if you do not, we will leave work," though not necessarily a threat, was capable of being so construed; and the fact whether it was so intended was for the magistrate to decide. The essence of the offence is the forcing or endeavouring to force an employer to limit the number or description of his workmen; and the threats employed for that purpose are matter of evidence only: In *Re Perham*, 5 H. & N. 30. In the next place, the threat was unlawful on another ground, namely, that it was a threat in effect by each workman, that all who had signed the paper set out in the case would leave their employment. A combination of workmen to procure the discharge of fellow workmen who are obnoxious to them, by intimidating their employer, is an illegal conspiracy.

Sleigh, for the appellant.—In *Re Perham* the conviction was for

endeavouring by threats to force a workman to leave his employment. [HILL, J.—The words of stat. 6 G. 4, c. 129, s. 3, with reference to that offence and to that now in question, are substantially the same. And in *In Re Perham*, as in the present case, the threat was, that others in addition *to the speaker would combine to carry it out.] It is [*520 no longer illegal for workmen to refuse to work with other workmen employed in the same service: the prohibition in stat. 40 G. 3, c. 106, s. 3, against their so refusing without just and reasonable cause, having been repealed by stat. 6 G. 4, c. 129, s. 2. [HILL, J.—Stat. 6 G. 4, c. 129, s. 2, repeals all previous Acts relative to combinations of workmen or masters, as to wages, time of working, or quantity of work, &c. Sect. 3 creates several offences; amongst others, that of by threats forcing or endeavouring to force an employer to limit the number or description of his workmen. Sect. 4 exempts from punishment persons meeting together for the sole purpose of settling the rate of wages which they will demand for their work, or the hours for which they will work. Does not this exemption lead to the inference that workmen combining for any other purpose, for instance, for that of endeavouring to force a master to limit the number of his workmen, are guilty of an offence?] Sect. 4 merely expresses more clearly the intention of the Legislature in sect. 2 in repealing the Acts against combinations; an intention still further explained by sect. 5, which protects from liability masters who meet to determine the rate of wages they will pay to, and the hours of work they will exact from, their workmen. Rolfe, B., in summing up to the jury in *Regina v. Selsby*, 5 Cox. C. C. 495, 496, note to *Regina v. Rowlands*, said that, before the statute, it was understood to be the law that, although the masters might meet to fix the rate of wages, the workmen might not. [CROMPTON, J.—In *Rex v. Mawbey*, 6 T. R. 619, 636, Grose, J., in giving judgment, says, “In many cases an agreement to *do a certain thing has been considered as the subject of an indictment for a conspiracy, though [*521 the same act, if done separately by each individual without any agreement among themselves, would not have been illegal. As in the case of journeymen conspiring to raise their wages: each may insist on raising his wages, if he can; but if several meet for the same purpose, it is illegal, and the parties may be indicted for a conspiracy.” I have always thought that to be a true statement of the law, notwithstanding the doubts expressed upon the subject by Lord Campbell, C. J., in *Hilton v. Eckersley*, 6 E. & B. 47, 62 (E. C. L. R. vol. 88).]

Giffard, in reply.—The appellant and his fellow workmen entered into an illegal combination to coerce their master in the choice of the men whom he would employ. Granting that it was lawful for them to leave the service, it was not lawful to intimidate the master into dismissing others, by the threat of leaving. Many things are lawful by themselves which in combination are unlawful: for instance, it is lawful to pay money, and to abstain from marriage; but it is unlawful to pay money to another not to marry. Combinations amongst workmen to do that which is prohibited by sect. 3 of the Act are not within the protection of sect. 4.

COCKBURN, C. J.—I am of opinion that this conviction must be affirmed. I am decidedly of opinion that every workman who is in

the service of an employer, and is not bound by agreement to the contrary, is entitled to the free and unfettered exercise of his own discretion as to whether he will or will not continue in that service in conjunction with any other person or persons who may be obnoxious *522] to him. More than this; any number *of workmen who agree in considering some of their fellow-workmen obnoxious, have each a perfect right to put to their employer the alternative of either retaining their services by discharging the obnoxious persons, or losing those services by retaining those persons in his employment. But if they go further, and, not content with simply putting the alternative to the employer, combine to coerce him, by threats of jointly doing something which is likely to operate to his injury, into discharging the obnoxious persons, I think that they may properly be said to bring themselves within the scope of the 8d section of the statute. In the case before us, it was not one man merely who went to the employer and said that he should leave if the obnoxious workmen did not; nor several men merely, who, adopting the same course, gave their master the option of retaining them or the obnoxious men in his service: but several men, who combined together with the object of coercing the master into dismissing the obnoxious workmen, by the threat of otherwise leaving in a body at a moment's notice. Although I at first entertained some slight doubt whether what was said amounted to a "threat," I have no doubt whatever that the conduct of the appellant and the other malcontent workmen amounted to a "molesting" of the master, within the meaning of the Act; and that their proceedings were altogether illegal, whether it is said that they threatened and intimidated, or that they molested and obstructed the respondent, their employer, in his business.

(WIGHTMAN, J., was absent.)

CROMPTON, J.—I am of the same opinion. I doubted very much, *523] on first reading the case, whether the *conviction was right; because the threats and intimidation used by the workmen did not point to the commission by them of an act in itself unlawful; the threat being that they would do that which, taken by itself, they had a perfect right to do; namely, leave the employment. Although, however, I think that any workman has a right to go to his master and say, "It is my whim not to work in company with so and so," I think that several workmen have no right to combine to procure the discharge of persons obnoxious to them by threatening to leave the employment at once in a body, unless those persons are forthwith discharged. It is matter of common learning, that what a man may do singly he may not combine with others to do to the prejudice of another. Stat. 6 G. 4, c. 129, by repealing all the previous statutes on the subject, appears to me to have re-established the common law as affecting combinations of masters or workmen. I adhere to the opinion that, at common law, all such combinations are illegal, and that Grose, J., rightly states the law in the passage to which I referred in the course of the argument.(a) That being so, it was necessary, by sects. 4 and 5 of the statute, to render legal the combinations of workmen and masters therein referred to respectively, and which would, at common law, have been illegal. The combination charged

(a) In *Rex v. Mawbey*, 6 T. R. at p. 636.

in the present case is one by workmen to threaten to leave the respondent's service if he did not dismiss certain other workmen. That is a combination not within the protection of sect. 4, and falling within the prohibition in sect. 3 against endeavouring by threats or intimidation to force an employer to limit the number or description of his workmen. As in the *indictment in Regina v. Rowlands*, 5 Cox C. C. 436, and the conviction in *In re Perham*, 5 H. & N. 30, so in the conviction now before us, the threats used by the appellant are not set out; those cases, however, show that that is immaterial; the nature of the language used, and whether or not it amounted to a threat, being matter of evidence, and solely for the consideration of the magistrate. In the present case the magistrate decided (and I think rightly) that the appellant's language did amount to a threat, and that he had committed an offence under sect. 3 of the Act.

HILL, J.—I am of the same opinion. I have very little to add to what has fallen from the rest of the Court, in which I entirely concur. "Threat," in the statute, must mean a threat to do an illegal act. The question therefore is, was the act threatened by the appellant illegal? I entirely agree with what the Lord Chief Justice has said as to the right of an individual workman, or any number of workmen, to tell their employer that they decline to continue to work with particular men to whom they object. If, however, they act in a combination, not honestly or independently, but by way of a conspiracy, in order to coerce their employer to dismiss the men obnoxious to them, that combination is illegal. There was abundant evidence before the magistrate that the appellant had threatened the respondent with the carrying out of a combination amounting to an illegal conspiracy at common law. The appeal must therefore be discharged. Conviction affirmed.

*525] *The QUEEN, on the prosecution of RICHARD ORGAN, v. The General Council of Medical Education and Registration of the UNITED KINGDOM. Jan. 21.*

The Medical Act, 21 & 22 Vict. c. 90, by sect. 15 enacts, that every person possessed of one or more of certain specified qualifications shall be entitled to be registered as a medical practitioner on payment of certain fees, and production to the registrar of evidence of his qualification. By sect. 17, every person who was actually practising medicine in England before 1st August, 1815, is entitled to be registered in like manner. By sect. 46, power is given to the General Council of Medical Education (who, by sect. 6, may delegate their powers to the Branch Council) to dispense with such provisions of the Act as they think fit, in favour of, amongst other classes of practitioners, persons acting as surgeons in the public service. Sect. 26 enacts that "no qualification shall be entered on the register, either on the first registration or by way of addition to a registered name, unless the registrar be satisfied by the proper evidence that the person claiming is entitled to it; and any appeal from the decision of the registrar may be decided by the general council;" "and any entry which shall be proved to the satisfaction of" the council "to have been fraudulently or incorrectly made may be erased from the register by order in writing of" the council. And, by sect. 29, "if any registered medical practitioner shall be convicted" "of any felony or misdemeanour," "or shall after due inquiry be judged by the general council to have been guilty of infamous conduct in any professional respect, the general council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register."

O., a medical practitioner, was registered under sect. 46, by special order of the branch council, on his representation that he was acting as a surgeon in the public service. Sub

sequently the general council, after holding an inquiry of which he had due notice, and at which he attended under protest but made no defence, erased his name from the register, on the grounds, first, that it was proved to their satisfaction that the entry of it was fraudulently and incorrectly made; secondly, that they, after due inquiry, judged him to have been guilty of infamous conduct in a professional respect.

Held, discharging a rule for a mandamus to the general council to restore O.'s name to the register, that the council had jurisdiction under the circumstances to erase his name: both under sect. 26, the second clause of which was not limited to the case of persons registered under sects. 15 or 17, and under sect. 29, which did not make it a condition to the erasure that the infamous professional conduct of which O. was judged guilty should have been proved to the council to have occurred before his registration.

HAYES, Serjt., had obtained a rule, calling on The General Council of Medical Education and Registration of the United Kingdom to show cause why a writ of mandamus should not issue, commanding them to restore the name of Richard Organ to the medical register.

*526] It appeared from the affidavits that Richard Organ, having been, in 1859, inserted in the medical register, as being a surgeon in the public service, by the Branch (a) Medical Council for England, under The Medical Act, 21 & 22 Vict. c. 90, s. 46, on his petition dated 12th January, 1859, was afterwards, in consequence of certain charges made against him, removed from the register by the general council; and that, in Easter Term, 1860, this Court made absolute a rule for a mandamus to the council to restore him, on the ground that he had not been heard in his defence before removal. The council, in obedience to this rule, at once restored his name to the register, and soon afterwards, on or about 29th May, 1860, gave him the following notice.

"Medical Registration Office,

"32, Soho Square, London, W.C.,

May 28th, 1860.

"Sir,

"Information having reached the medical council that you are not possessed of any qualification entitling you to registration, and that certain of the representations contained in your memorial to the council, dated 12th January, 1859, are untrue, and that your name has been incorrectly placed on the medical register, and, further, that you have been guilty of conduct infamous in a professional respect, in endeavouring to obtain by fraudulent means a diploma from the Royal College of Surgeons of Edinburgh, I have to inform you that, on the 18th day of June now next ensuing, at three o'clock in the afternoon, the medical council will meet at The Royal College of Physicians, in Pall Mall East, London, and will then and there institute an investigation into *the truth of these allegations, with
*527] a view to decide whether, on all or any of the above grounds, your name ought to be erased from the medical register. At that investigation you are hereby invited and requested to be present. You will also take notice that the meeting of the council is fixed peremptorily for the day hereinbefore named, on which day the inquiry will be prosecuted, whether you attend or not.

"FRANCIS HAWKINS, M.D., Registrar."

On the receipt of this notice, Mr. Organ's attorney wrote to inquire whether Mr. Organ would be allowed to appear by counsel, and, also, for further information as to which of the representations in his me-

(a) Sect. 46 empowers The General Medical Council to register such surgeons; but, under sect. 4, that council may delegate its powers to the Branch Council.

morial were said to be incorrect; and he received an answer from the registrar, referring him "especially to the statements as to his (Mr. Organ's) appointments as medical officer and public vaccinator to various parishes;" adding, "but the medical council do not, of course, bind themselves to confine their inquiries exclusively to that part of the memorial. I am directed by the council to inform you that, whilst they are ready to allow Mr. Organ the fullest opportunity of explaining and answering the allegations made against him, they do not think fit to grant his application to be heard by counsel."

The attorney wrote in reply that Mr. Organ would appear under protest, and offer no evidence. Mr. Organ and his attorney accordingly attended the meeting on 18th June, 1860, and after protest on their part, the council proceeded to read affidavits, in which the facts were detailed on which the charges pointed out in the notice of 28th May were founded; the transaction with regard to the diploma at Edinburgh having taken place early in year 1858. After the reading of the affidavits, in an answer to an offer by the chairman [*528 to hear any explanation, Mr. Organ and his attorney again protested, and declined to interfere. The council on the following day, 19th June, 1860, passed the following resolutions, and forwarded copies of them to Mr. Organ.

"That, it having been proved to the satisfaction of the general council that the entry of the name of Richard Organ has been fraudulently and incorrectly made on the register, the general council do by this order in writing direct that his name be erased from the register; that Richard Organ having been judged by the general council, after due inquiry, to have been guilty of infamous conduct in a professional respect, the general council do hereby adjudge that the name of the said Richard Organ be erased from the register, and do by this order direct the registrar to erase his name from the register accordingly."

Montague Smith and Sleight now showed cause.—The council had jurisdiction to order Mr. Organ's name to be erased from the register upon both or one or other of the grounds stated in the resolutions of 19th June. The Medical Act, 21 & 22 Vict. c. 90, enacts by sect. 15, that "Every person now possessed, and (subject to the provisions hereinafter contained) every person hereafter becoming possessed, of any one or more of the qualifications described in the Schedule (A.) to this Act, shall, on payment of a fee, not exceeding 2*l.*, in respect of qualifications obtained before the 1st day of January, 1859, and not exceeding 5*l.* in respect of qualifications obtained on or after that day, be entitled to be registered on producing to the registrar of the branch council for *England, Scotland, or Ireland, the document [*529 conferring or evidencing the qualification or each of the qualifications in respect whereof he seeks to be so registered, or upon transmitting by post to such registrar information of his name and address, and evidence of the qualification or qualifications in respect whereof he seeks to be registered, and of the time or times at which the same was or were respectively obtained." By sect. 17, "Any person who was actually practising medicine in England before the 1st day of August, 1815, shall, on payment of a fee to be fixed by the general council, be entitled to be registered on producing to the registrar of the branch council for England, Scotland, or Ireland, a declaration

according to the form in the Schedule (B.) to this Act signed by him, or upon transmitting to such registrar information of his name and address, and enclosing such declaration as aforesaid." These being the provisions under which medical practitioners in general may get themselves put on the medical register, the Act, by sect. 46, enacts that "It shall be lawful for the general council, by special orders, to dispense with such provisions of this Act or with such part of any regulations made by its authority as to them shall seem fit, in favour of," amongst others, "any persons who" "are acting as surgeons in the public service." Mr. Organ, it appears, obtained registration under this latter section, on his statement that he was a surgeon in the public service. Such being the provisions of the Act as to registration, and such the mode by which Mr. Organ got on the register, the question is whether the Council of Medical Education can justify his removal therefrom, under the powers conferred on them by other sections. Those sections are the 26th and the 29th. By sect. 26 it is *530] enacted that "No qualification shall be entered on the register, either on the first registration or by way of addition to a registered name, unless the registrar be satisfied by the proper evidence that the person claiming is entitled to it; and any appeal from the decision of the registrar may be decided by the general council, or by the council for England, Scotland, or Ireland (as the case may be); and any entry which shall be proved to the satisfaction of such general council or branch council to have been fraudulently or incorrectly made may be erased from the register by order in writing of such general council or branch council." And sect. 29 enacts that "If any registered medical practitioner shall be convicted in England or Ireland of any felony or misdemeanour, or in Scotland of any crime or offence, or shall after due inquiry be judged by the general council to have been guilty of infamous conduct in any professional respect, the general council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register." The council were justified, under either of these sections, in removing Mr. Organ's name from the register. It having been proved to their satisfaction that the entry of his name on the register had been fraudulently and incorrectly made, sect. 26 applies; as does sect. 29, the council having, after due inquiry, judged Mr. Organ to have been guilty of infamous conduct in a professional respect. The other side will contend that, in order for sect. 29 to apply, it must be proved that the infamous professional conduct, there mentioned, occurred before the name was put on the register. But that section is not to be thus restricted in its operation. It provides for the erasure of a practitioner's *531] name, if he shall be "judged "to have been" guilty of the infamous conduct; by which must be meant, to have been thus guilty at any time before the adjudication. [CROMPTON, J.—That would seem to be the reasonable construction, having regard to the enactment in sect. 15, under which it appears that any duly qualified person is entitled to be registered, without regard to his character, if he pays the proper fee and produces to the registrar sufficient evidence of his qualification.] Yes: it was necessary to give power to the council, by sect. 29, to remove the names of persons of infamous professional character; who, being entitled in the first

instance to registration, could not otherwise be erased from the register. Whether or not, however, the council can justify their proceeding under sect. 29, they clearly can do so under sect. 26: which must give them power to expunge from the register any name, however it got there, the entry of which was fraudulent or incorrect.

Hayes, Serjt., in support of the rule.—First, as to sect. 29. The expression “infamous conduct in any professional respect,” is very vague; and the council ought to find proved some definite instance of such misconduct on the part of a practitioner, before taking the extreme course of striking his name off the register. Assuming, however, that they are not bound to find him guilty of any precise misconduct, they must, at all events, find that he was guilty of the misconduct imputed to him before he was registered. Sect. 15 gives an absolute right to every qualified person to be placed on the register; and it would be strange if a subsequent section should give the council the power of nullifying that right by striking such a person off on account of *conduct by him before he was put on. [*532 Sect. 29 applies to “any registered medical practitioner” only; by which must be meant any medical practitioner who after registration incurs the pains and penalties of the section. The subsequent words “judged” “to have been guilty,” merely mean that the guilt must be complete at the time of adjudication; not that it may have taken place at any time before then. This clause of the section ought not to receive a different construction from its first clause, by which, “If any registered medical practitioner shall be convicted” “of any felony or misdemeanour,” his name may be erased. That clause plainly applies only to a conviction after registration, and also, it must reasonably be supposed, to a conviction for an offence committed since the offender’s registration. Otherwise, there is this anomaly, that guilt, followed by conviction before the offender’s registration, does not disqualify him, once registered, from remaining on the register; but the same guilt, if not followed by conviction until after the registration, does disqualify him. The general rule in interpreting statutes, that they are not to be construed retrospectively, ought to prevail here; especially as the Act takes away or restricts pre-existing rights. Secondly, sect. 26 applies only to the erasure of names improperly put upon the register by the registrar, and to appeals from his decision to that of the council. The council cannot, therefore, justify under that section the erasure of Mr. Organ’s name, he having been put on the register, not by the registrar, but by special order of the council under sect. 46. [HILL, J.—The first clause of sect. 26 no doubt has the limited application, only, for which you contend; but its second clause, under which the council have acted in this case, *authorizes the council to erase from the register [*533 “any entry which shall be proved to” their satisfaction “to have been fraudulently or incorrectly made,” by whomsoever it was made.] At all events, the council ought to have found the facts relating to the fraud.

(COCKBURN, C. J., and WIGHTMAN, J., were absent.)

CROMPTON, J.—I am of opinion that this is not a case for the grant of a writ of mandamus by the Court in the exercise of its discretion. But, further, apart from the merits, I think that the rule should be

discharged, on the ground that sect. 26 of the statute, under which the general council have acted, is applicable to the present case. The council have found that the entry of the applicant's name on the register was fraudulently and incorrectly made. It is now said, on his behalf, that they ought to have found the specific facts. This Court has, however, already granted the applicant a mandamus calling on the council to hear him in his defence; and he has since had an opportunity of being heard, of which he has declined to avail himself. There is no end, therefore, to be gained, by sending the case again before the council for the facts to be ascertained. I think that we have no right to interfere with their determination, founded, as we must assume it to have been, upon sufficient evidence, unless they had no jurisdiction at all. In my opinion, however, they had jurisdiction. Sect. 15 of the Act gives an absolute right to persons possessed of certain qualifications, to be registered as medical practitioners by the registrar on payment of specified fees and production of evidence of their qualifications. Then sect. 26 empowers the council *584] "to erase from the register any entry proved to their satisfaction to have been fraudulently or incorrectly made. It is clear that this erasure may be made on the application of a third party; and equally clear that the operation of the enactment is not restricted to cases in which the entry was made, under sect. 15, by the registrar. There is no reason why sect. 26 should be restricted to such cases, any more than sect. 29 is, or than sect. 39 is, which makes it a misdemeanour in any person to "wilfully procure or attempt to procure himself to be registered under" the "Act," by false or fraudulent representations. These sections must all apply to every registration, whether under sect. 15 or under sect. 46. There is, indeed, greater reason for their application to registrations of the latter than to those of the former description; inasmuch as the council, by whose special dispensation the registration may, under sect. 46, take place, are more likely to be exposed to deception than the registrar, who registers applicants under sect. 15. I also think that the case falls within the scope of the 29th section. Medical practitioners are not amenable to the jurisdiction of the council, under that section, until they have been registered. But if, at the time of their conviction for an offence, or of their adjudication by the council to have been guilty of infamous professional conduct, they are registered, the section applies, and it is immaterial at what time the offence or misconduct, respectively, may have been committed. It is said that this construction makes the Act retrospective. It does so to a certain extent, but not in the general sense in which the rule against giving a retrospective operation to statutes is understood.

*585] *HILL, J.*—I am of the same opinion. On the first point I entirely agree with my brother Crompton. The granting of a mandamus is to some extent discretionary with the Court; and I am clearly of opinion that, under the circumstances of the present case, we ought not to interfere. The facts are, that Mr. Organ, having been put upon the register by a special order of the council under sect. 46 of the Act, and having subsequently been removed from it without a hearing, obtained from this Court a rule for a mandamus to the council to restore him on that ground. This was, in effect, a rule calling

upon the council to hear his defence. They, accordingly, in obedience to the rule, restored him, and called upon him to answer certain specific charges, with a view to a decision whether his name ought not to be erased from the register. The council having afterwards refused, as they had a right to do, his application to be heard by counsel, he attended before them at the hearing of the charges, and said nothing in defence, contenting himself with merely disputing the council's jurisdiction. The council then found two facts proved; first, that he had obtained his registration fraudulently; and, secondly, that he had been guilty of infamous professional conduct. The first fact justified his removal from the register under sect. 26, the second under sect. 29; and the council were acting within their jurisdiction in erasing his name, if either of those sections apply. I am of opinion that both those sections do apply. The scope and object of the Act is clear. Sect. 15 gives an absolute right to all persons possessing certain qualifications to be placed on the register by the registrar. Sect. 17 entitles all persons who are actually practising medicine in England before 1st August 1815, to the same advantage. Sect. 46 empowers the general council to dispense by special orders with the provisions of, and with regulations made under, the Act, in favour of certain specified classes of practitioners. The present applicant, Mr. Organ, was registered in pursuance of an order of the council under sect. 46; and it has been argued on his behalf, that the second clause of sect. 26 does not apply to such a registration, but only to registrations by the registrar. I think, however, that that clause, equally with sect. 39, the language of both being equally general, must be read as applying to the case of every registered practitioner, whether he be registered under sects. 15 or 17, or under sect. 46. If it be necessary to give an opinion with respect to sect. 29, I should say that that section also applies. The first clause of that section applies, if the conviction of an offender takes place after his registration, although for an offence committed before it; and in like manner the second clause applies, if the council adjudge a man to have been guilty of infamous professional conduct before his registration, provided that the adjudication be after it. The decision of this point, however, is not absolutely necessary, the first ground being sufficient to dispose of the case: but I think it right, notwithstanding, not to withhold the strong opinion which I entertain upon it.

Rule discharged, with costs

*DIXON v. FAWCUS. Jan. 22.

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Declaration, for that, plaintiff having agreed with defendant to make for and sell to him bricks, to be marked as defendant might direct, defendant wrongfully, deceitfully, and injuriously directed plaintiff to mark them with the name of R.; defendant then well knowing, and plaintiff not knowing, as the fact was, that R. used that name as a mark on bricks made and sold by him, to distinguish them from bricks made and sold by other persons; and that plaintiff, by so marking the bricks to be made for defendant, would become liable to legal proceedings for damages as the suit of R., and to be restrained by injunction from making any more of such bricks. That plaintiff, in ignorance of the consequences, and of R.'s rights, marked the bricks as directed by defendant, and delivered them to him. That R. thereupon filed a bill in Chancery against plaintiff for an injunction, on account of the profits made by plaintiff from the bricks and a decree

that plaintiff should pay the amount thereof to R. That plaintiff thereupon compromised such suit by paying R. a large sum of money for his damages, costs, and expenses, and was also compelled to pay large sums of money for the costs of his own necessary defence to the suit.

Demurrer. Joinder in demurrer.

Held, that the declaration disclosed a good cause of action, on the ground that plaintiff, though innocent of fraud in counterfeiting R.'s mark, was nevertheless liable in equity to the suit for having in fact counterfeited it: and semble also on the ground that, the natural consequence of defendant's act being to plunge plaintiff into the Chancery suit, and thereby to cause him to incur costs and expenses, plaintiff, whether or not he was liable to the suit, had a good cause of action against defendant to recover the damages so sustained.

THE first count of the declaration stated that plaintiff, who, before and at the time of the committing by defendant of the wrongful acts thereafter mentioned, was a manufacturer of, and carried on the business of manufacturing and selling, fire bricks, at the request of defendant agreed with defendant that he, plaintiff, would manufacture and sell and deliver divers large quantities of fire bricks to defendant, at or for certain prices to be paid to plaintiff by defendant for the same; and that all fire bricks supplied by plaintiff to defendant should be marked in such manner as defendant might direct. That, after the making of the said agreement, defendant wrongfully, deceitfully and injuriously, and contrary to his duty in that behalf, directed that divers fire bricks, to be manufactured, sold and delivered by plaintiff to defendant in pursuance of the said agreement, should be marked with the word or name "Ramsay," defendant then well knowing, as *538] the *fact was, that George Heppell Ramsay, before and at the time mentioned aforesaid, had been and was a manufacturer of fire bricks, and had been and was accustomed to manufacture and sell, and did in fact manufacture and sell, fire bricks marked with the name or word "Ramsay," in order to indicate that the fire bricks by the said G. H. Ramsay manufactured and sold were fire bricks manufactured and sold by him; and also to distinguish the fire bricks so manufactured and sold by him from fire bricks manufactured and sold by other persons. That, at the time when defendant directed plaintiff to mark in manner aforesaid fire bricks so to be manufactured, sold and delivered by plaintiff to defendant as aforesaid, defendant well knew, as the fact was, that such fire bricks, when so marked, sold and delivered by plaintiff to defendant, would counterfeit, imitate and resemble fire bricks manufactured, marked and sold by the said G. H. Ramsay, in manner aforesaid; and that plaintiff, by manufacturing and marking such fire bricks in manner aforesaid, and selling and delivering the same to defendant, would render himself liable to have legal proceedings taken against him, at the suit of the said G. H. Ramsay, to recover damages against him for so manufacturing, marking and selling such fire bricks; and also for the said G. H. Ramsay to obtain an injunction against the manufacturing and selling of fire bricks marked in manner aforesaid by plaintiff; and also liable to pay the amount of such damages as aforesaid to the said G. H. Ramsay. And defendant then wrongfully and fraudulently intended that the said fire bricks which he so directed plaintiff to manufacture and mark in manner aforesaid, and deliver to defendant as aforesaid, should, in fact, when *539] *manufactured and marked, and sold and delivered, to defendant, counterfeit, imitate and resemble fire bricks so manufactured,

marked and sold by the said G. H. Ramsay as aforesaid; so that defendant might and should be enabled, wrongfully and fraudulently, to sell the said fire bricks so to be by plaintiff manufactured, and marked and sold and delivered to defendant, as and for fire bricks manufactured by the said G. H. Ramsay. That plaintiff, being ignorant of the said manufacture, marking and sale of fire bricks by the said G. H. Ramsay as aforesaid, and being also ignorant that the manufacturing and marking of fire bricks in pursuance of and according to the said direction of defendant, and the selling of such fire bricks to defendant, would be wrongful, or would render plaintiff liable to such legal proceedings and to pay such damages as aforesaid, did, in pursuance of and according to the said direction of defendant, manufacture divers large numbers of fire bricks for defendant, and to be sold and delivered by plaintiff to defendant, in pursuance of the said agreement; and plaintiff, being so ignorant as aforesaid, did, in pursuance of the said direction of defendant, mark each of the same fire bricks, by him so manufactured, with the said name or word "Ramsay;" and such fire bricks, by plaintiff so manufactured and marked in pursuance of the said directions of defendant, did in fact counterfeit, imitate and resemble fire bricks by the said G. H. Ramsay manufactured and marked and sold as aforesaid. That plaintiff, being so ignorant as aforesaid, did sell and deliver to defendant divers large quantities of the said fire bricks by him, plaintiff, so manufactured and marked as aforesaid. That, by reason and means of the *aforesaid [*540 wrongful acts of defendant, and the several premises aforesaid, and by reason of plaintiff acting in manner aforesaid, at the request and by the direction of defendant, and not otherwise, he, plaintiff, by manufacturing and marking fire bricks in manner aforesaid, and selling and delivering such fire bricks to defendant as aforesaid, became and was liable to have legal proceedings taken against him by and at the suit of the said G. H. Ramsay, to recover damages against plaintiff for and by reason of plaintiff so manufacturing and marking the said fire bricks in manner aforesaid, and selling and delivering the same bricks so marked, to defendant as aforesaid; and also for the said G. H. Ramsay to obtain an injunction against the manufacturing and selling of fire bricks marked in manner aforesaid; and also liable to pay the amount of such damages as aforesaid to the said G. H. Ramsay. That afterwards, and after plaintiff had delivered divers of the said fire bricks by him manufactured and marked and sold to defendant as aforesaid, and whilst plaintiff had in his possession some others of the fire bricks by him so manufactured and marked, in pursuance of the said direction of defendant as aforesaid, the said G. H. Ramsay filed his bill of complaint in the Court of Chancery, praying that plaintiff might be restrained by the perpetual injunction, and in the meantime by the order and injunction, of the said Court, from stamping or marking, or causing or allowing to be stamped or marked, any fire bricks manufactured by or for him with the name or mark "Ramsay," or with any other name or mark so contrived or expressed as by colourable imitation or otherwise to represent the fire bricks manufactured by plaintiff to be the same as the fire bricks manufactured by the said *G. H. Ramsay; and also from selling or offering for sale, or [*541 procuring to be sold, or otherwise parting with or disposing

to the law.] The protection, in equity, of the right to the exclusive use of a trade mark, is of modern origin. In *Blanchard v. Hill*, 2 Atk. 484, the plaintiff moved for an injunction to restrain the defendant from using the Mogul stamp on his cards, suggesting the sole right to be in the plaintiff, he having appropriated the stamp to himself, conformably to the charter granted to The Card Makers' Company by King Charles the First. Lord Hardwicke, however, refused the injunction, and said that he knew no instance of restraining one trader from making use of the same mark with another. At the present day, when the jurisdiction of equity is admitted, there is no sufficient reason for saying that that Court will afford greater protection to the right to the exclusive use of a trade mark than can be obtained at law; or that it will hold an innocent counterfeiter responsible for the infringement of such a right. Lastly, the costs incurred by the now plaintiff, in the Chancery suit brought against him by Ramsay, are not, in any view of the case, recoverable as damages from the now defendant: *Malden v. Fyson*, 11 Q. B. 292 (E. C. L. R. vol. 63), *Broom v. Hall*, 7 C. B. N. S. 503 (E. C. L. R. vol. 97), *Collins v. Cave*, 4 H. & N. 225. [CROMPTON, J., referred to *Collen v. Wright*, 7 E. & B. 301.(a)]

Hindmarch, contra, was not called upon.

(COCKBURN, C. J., was absent; and WIGHTMAN, J., left the Court before the close of the argument.)

*546) *CROMPTON, J.—I am of opinion that our judgment must be for the plaintiff. *Millington v. Fox*, 3 Myl. & Cr. 338, a case of the highest authority, shows that a Court of equity will grant a perpetual injunction against the use, by one tradesman, of the trade marks of another, although such marks have been so used in ignorance of their being any person's property, and under the belief that they were mere technical terms: the only doubt expressed by Lord Cottenham was as to the right of the plaintiffs in that case to costs. That decision, though it has been questioned in subsequent cases, has never been overruled; and is binding in this Court. Even in *Farina v. Silverlock*, 6 De G. M. & G. 214, 222, Lord Chancellor Cranworth says, "Once arrive at the point that the use of this label is an infringement of the plaintiff's right, and I quite agree with what the Vice Chancellor has laid down, for this Court would stop anybody from selling an article which should enable the perpetration of that fraud, just as it would stop the use of the label itself." It would seem, therefore, that the mere fact of the sale by one person of an article marked with the trade mark of another is sufficient of itself, in equity, apart from the intention of the seller, to constitute fraud, and entitle the other to an injunction, on proof (which was wanting in *Farina v. Silverlock*), that the sale is an infringement of the right of the other. Upon the remaining point, I am not prepared to say that, if the natural consequence of the defendant's acts has been to plunge the now plaintiff into a Chancery suit, the latter may not recover against the former, as damages in an action at law, the costs of that suit, whatever the result of it might have been.

(a) Judgment affirmed in the Exchequer Chamber, 8 E. & B. 647 (E. C. L. R. vol. 32)

HILL, J.—I am of the same opinion. The facts alleged *in the declaration, which must be taken to be true, are that the [*547 defendant, having employed the plaintiff to make bricks for him, knowingly directed the plaintiff to mark these bricks with the trade-mark of another person; that the plaintiff, acting innocently and in ignorance of the rights of that person, complied with the direction; and that that person, Ramsay, thereupon filed a bill in Chancery for an injunction against the plaintiff, who compromised the suit at a heavy expense, to recover which, as damages from the defendant, he now brings this action. I am of opinion, upon these facts, that the plaintiff is entitled to recover. *Millington v. Fox*, 3 Myl. & Cr. 338, which, however much it may have been questioned, has not been overruled, is a direct authority that the plaintiff was liable to the suit in equity; though he had counterfeited Ramsay's trade-mark innocently. Moreover, the case of *Farina v. Silverlock*, 6 De G. M. & G. 214, appears rather to support than to contravene that decision. Lord Chancellor Cranworth, in that case, differed from Wood, V. C., rather as to the facts than as to the law. He says, (a) "I apprehend that the law is perfectly clear, that any one, who has adopted a particular mode of designating his particular manufacture, has a right to say, not that other persons shall not sell exactly the same article, better or worse, or an article looking exactly like it, but that they shall not sell it in such a way as to steal (so to call it) his trade-mark, and make purchasers believe that it is the manufacture to which the trade-mark was originally applied." "What, however, appears to me to be really in dispute in this case is, the fact, whether or not it is true that there are a great number of persons who may legitimately purchase and do ordinarily legitimately *purchase the labels in question, be- [*548 cause if there are, I confess that then I cannot concur in the decree which has been made by the Vice-Chancellor. Once arrive at the point that the use of this label is an infringement of the plaintiff's right, and I quite agree with what the Vice-Chancellor has laid down, for this Court would stop anybody from selling an article which should enable the perpetration of that fraud, just as it would stop the use of the label itself." The bill in that case stated that the defendant had printed and sold labels, being either copies of or only colourably differing from those which the plaintiff had invented and used for the purpose of distinguishing his Eau de Cologne from that of others; that thereby great quantities of spurious Eau de Cologne, made to resemble the plaintiff's, had been sold as the plaintiff's; and that thereby the plaintiff had been greatly injured. There was no allegation, however, that the defendant had fraudulently sold the labels; the observations, therefore, of the Lord Chancellor must be taken as an expression of his opinion that the defendant, though he had sold them innocently, would have been responsible if it had been proved that the sale was an infringement of the plaintiff's right. Upon this ground, therefore, our judgment must be for the now plaintiff. But I also agree with my Brother Crompton, that, if the natural consequence of the defendant's acts was (as it evidently was) to plunge the plaintiff into a Chancery suit, and thereby to incur costs and expenses, the plaintiff has a good cause of action against the

(a) 6 De G. M. & G. 218, 222.

defendant, to recover those costs and expenses as damages, whatever the result of the suit in question might have been.

Judgment for the plaintiff.(a)

(a) See *Burgess v. Hills*, 26 Beav. 244; *Burgess v. Hatley*, 26 Beav. 249.

The property in a trade-mark consists of the exclusive right to make use of it for the purpose of designating the owner's goods. Equity will restrain any stranger who makes use of it, on the ground that such user is a violation of a right of property, *Bradley v. Norton*, 33 Conn. 157, and his ignorance of the fact that the plaintiff had already appropriated the trade-mark, and the absence of any intention on his part to interfere with the plaintiff's privilege, will not deter the court from enjoining: *Dale v. Smithson*, 12 Abb. Pr. (1861) 287.

The principal case is a logical sequence of the decision in *Millington v. Fox*, which held that the violation of a trade-mark, though committed without any intention to injure the proprietor, rendered the party liable for the damages which he had caused. The plaintiff in the principal case, at the request of the defendant, counterfeited, though without knowledge of the fact, the trade-mark of a third person. The

defendant was justly compelled to indemnify him for the liability thus incurred to the proprietor. The ruling in *Millington v. Fox* has been followed in this country: *Dale v. Smithson*, *supra*; *Coffeen v. Brunton*, 4 MeLean (1849) 517; *Phalon v. Wright*, 5 Phila. (1864) 464.

The owner is entitled to an injunction against one who imitates his trade-mark so nearly that a purchaser might be misled; a substantial similarity is sufficient: *Bradley v. Norton*, *supra*; *Costs v. Holbrook*, 2 Sand. Ch. 586, and cases cited; *Taylor v. Carpenter*, Id. 603, s. c. in error, 611; *Partridge v. Henck*, Id. 622; *Williams v. Johnson*, 2 Bosw. 1; *Stokes v. Landgraf*, 17 Barb. 608; *Amoskeag Manufacturing Co. v. Spear*, 2 Sand. S. C. 599; *Wolfe v. Gouland*, 18 Howard Pr. 64; *Clark v. Clark*, 25 Barb. 76; *Brooklyn White Lead Co. v. Masury*, Id. 416; *Walton v. Crowley*, 3 Blatchford C. C. 440; *Barnet v. Phalon*, 10 Tiffany.

***DAVIES, Appellant, v. The Right Honourable RICHARD, BARON BERWICK, Respondent. Jan. 28. [*549**

Stat. 4 G. 4, c. 34, s. 3, enacts "That if any servant in husbandry" "shall contract with any person" "to serve him" "for any time or times whatsoever," "and" "having entered into such service shall" "be guilty of any" "misconduct or misdemeanour in the execution" of his contract, he may be convicted by justices and sent to the House of Correction, with hard labour.

Appellant was employed by respondent under a contract by the terms of which appellant was to keep the general accounts belonging to a farm of respondent, to weigh out food for cattle, to set the men to work, to lend a hand to anything if wanted, and in all things to carry out the orders of respondent. Appellant entered upon the employment, and, in the course of it, was ordered by respondent to go through the whole of the cattle stock under appellant's charge on the farm, and to give particulars of all the animals which had died under his care, and of all bullings and calvings which had taken place. Appellant, having refused to obey this order, was summoned before, and convicted by, justices, under the above enactment, for such refusal.

On appeal against this conviction, held that it was bad. First, because appellant was not a servant in husbandry; secondly, because, assuming that he was such a servant, he had not been guilty of any misconduct or misdemeanour in the execution of his contract to serve in that capacity.

CASE stated by justices of the county of Salop, under stat. 20 & 21 Vict. c. 43.

On 29th August, 1860, an information was laid by Henry Burd, as agent for the respondent, charging that the appellant, on 17th January, 1859, contracted with the said Henry Burd, as such agent, to serve the respondent, in the capacity and employment of a servant in husbandry, for the term of one year from 1st February, 1859, and so on from year to year, subject to a month's notice to determine such service at any time, at the wages of 1*l.* 5*s.* per week; and that the appellant, having entered on such service, and before the term of his contract was completed, was, on 23d August last, guilty of misconduct in unlawfully refusing to obey the order of the respondent, viz., to go through the whole of the cattle stock under his charge (on a certain farm at Cronkhill, in the county of Salop, where the appellant was employed), so as to enable one Watkins *to identify and mark the animals; and to give also particulars of all [*550 that had died under his care, as well as the bullings and calvings, whether dead or alive.

On 1st September, 1860, the appellant appeared on summons to answer the said information before the justices. By the evidence of the said Henry Burd, who was then examined as a witness on behalf of the respondent, it was proved, amongst other things, that the terms of the said contract were that the appellant should keep the general accounts belonging to the farm at Cronkhill; should weigh out food for cattle, and set the men to work; should lend a hand to anything if wanted; and, especially, should in all things carry out the orders of the respondent. That, on 23d August, 1860, the said Henry Burd conveyed an order written by the respondent and addressed to the appellant, in the terms set forth in the information; that he explained to the appellant the nature of the order, and handed him the paper; and that the appellant threw back the paper, stating that he would not give the information until something was cleared up, referring to a notice, which had appeared in the Shrewsbury papers, that the appellant was not authorized to receive moneys on behalf of the respondent.

That the appellant admitted that he had the information required, partly in a book and partly in his head. That the appellant had not any book belonging to the respondent, nor was he engaged to keep a herd-book; but that it was, in witness's opinion, part of the duty of a bailiff to do so.

The appellant was thereupon convicted by the justices under stat. 4 G. 4, c. 84, s. 8, and was adjudged to be committed to the House of Correction, with hard labour, for twenty-one days; and a proportionable part of his *wages (if any) during the time he should be
 *551] so confined was ordered to be abated.

The grounds of the conviction were, that the appellant was a servant in husbandry, and that the act of disobedience complained of was a misconduct or misdemeanour in the execution of his contract, within the meaning of stat. 4 G. 4, c. 84, s. 8.

The questions for the opinion of the Court were: First, whether the appellant was a servant in husbandry, within the meaning of the said statute: Secondly, whether the Act of disobedience complained of was such a misconduct or misdemeanour in the execution of his contract as is contemplated by the said statute.

Bovill, for the respondent.—The conviction was right. Stat. 4 G. 4, c. 84, s. 8, enacts "That if any servant in husbandry, or any artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer or other person shall contract with any person or persons whomsoever, to serve him, her or them, for any time or times whatsoever, or in any other manner, and" "having entered into such service shall" "be guilty of any" "misconduct or misdemeanour in the execution" of his contract, he shall be subject to conviction. Now, first, the appellant was a servant in husbandry, within the meaning of this enactment. His duties were not restricted to keeping the general accounts belonging to the respondent's farm, but it was his business, also, to weigh out food for cattle, set the men to work, attend to anything if wanted, and in all things carry out the respondent's orders. The expression, "servant in husbandry," in the statute, does not refer merely to persons engaged in tilling and sowing
 *552] land, or in other manual *acts connected with the production of crops; but includes all servants employed upon a farm, who are, by the terms of their contract of service, bound to make themselves useful in its management. In *Lilley v. Elwin*, 11 Q. B. 742 (E. C. L. R. vol. 68), it was not disputed that the plaintiff, a wagoner, was amenable to the jurisdiction of justices, under the statute, as a servant in husbandry. The statute has always received a liberal interpretation. Thus, in *Ex parte Ormrod*, 1 Dowl. & L. 825, 828, Williams, J., held that a person who had contracted to serve a firm of calico printers as a designer, for a term of years, was an "artificer" within the meaning of the Act. His Lordship, in giving judgment, said: "I cannot conceive that the word 'artificer' only applies to persons engaged in such occupations as require merely manual labour. The party who makes this application to the Court, himself states that he is a 'pattern designer,' a person in fact who makes the drawing of the pattern, which is then engraved on the printing rollers, and subsequently transferred in colours to the fabric itself. He is, therefore, the party who sets all in motion. He contributes in the most

material degree to this branch of manufacture, the printing of calico, and may, therefore, I think, be properly included under the term 'artificer.'" In *Bowers v. Lovekin*, 6 E. & B. 584 (E. C. L. R. vol. 88), this court put an equally wide construction on the same word "artificer," as used in the Truck Act, 1 & 2 W. 4, c. 37; holding that butty colliers, who get the produce of a mine at so much a yard, and employ others under them to increase the quantity, are artificers, within the meaning of that Act, because they must work personally, and are treated as workmen. Secondly, the *appellant was guilty of [*553 misconduct or misdemeanour in the execution of his contract, within the meaning of stat. 4 G. 4, c. 84, s. 3, by refusing to obey the order to go through the stock and give particulars of its increase or decrease while under his care. By the terms of his contract he was to lend a hand to anything, if wanted, on the farm, which was a breeding farm; and it was most essential to the respondent's interests that an account should be taken of the stock upon it, from time to time.

Huddleston, contra.—First, the appellant was not a servant in husbandry within the statute. In *Lilley v. Elwin*, 11 Q. B. 742 (E. C. L. R. vol. 63), the plaintiff, though he was engaged as a wagoner, during the harvest worked in the harvest-field generally; and the Court thought that it was to be taken as part of his contract that he should do so. He was clearly, therefore, a servant in husbandry, and was properly taken before a magistrate for refusing to continue to work in the harvest-field during the usual hours. But the appellant in the present case was not engaged as a servant at all; still less as a servant in husbandry. [CROMPTON, J.—His chief duty was to keep the general accounts belonging to the farm. From that, it should seem that his position was rather that of a steward than of a servant.] No doubt. All his other duties were ancillary to that of keeping the accounts. As to the stipulation that he was to lend a hand to anything if wanted, it did not authorize the respondent to exact from him duties not ejusdem generis with those of his employment. He was neither a servant in husbandry, nor did he come under any of the other descriptions of persons mentioned in the statute; nor was he a person *ejusdem generis with any of them, and therefore he was not liable [*554 to conviction as coming under the description of an "other person;" *Kitchen v. Shaw*, 6 A. & E. 729 (E. C. L. R. vol. 33). Secondly, the order, for disobedience to which the appellant was convicted, was one which he was not bound to obey. The case finds that he had no book belonging to the respondent, and that he was not engaged to keep a herd book. (He was then stopped.)

(COCKBURN, C. J., and WIGHTMAN, J., were absent.)

CROMPTON, J.—I am of opinion that this conviction must be quashed. First, the Act of Parliament applies only to persons who are engaged to do some kind of manual labour. I do not think that the appellant was employed for any such purpose. He appears to have been engaged rather as a sort of bailiff or superintendent on the farm, than as a servant in husbandry. The fact that it was one of his duties to weigh out food for the cattle would not make him a servant, any more than another of his duties, namely, to set the men to work, would do so. And although he was, by the terms of the

contract, to lend a helping hand, generally, it cannot be supposed that he was to assist in matters other than such as were connected with his principal work, which was, to keep the accounts. Assuming, however, that we held him to be a servant in husbandry, it is clear, secondly, that he did not misconduct himself in anything connected with husbandry work. The conviction is bad, therefore, on both grounds.

HILL, J.—I am of the same opinion on both points.

Conviction quashed.

***555]** *The QUEEN, on the prosecution of The Churchwardens and Overseers of the Poor of the Parish of MANGOTSFIELD, in the county of GLOUCESTER, Respondents, v. The Churchwardens and Overseers of the Poor of the Parish of TIVERTON, in the county of DEVON, Appellants. Jan. 23.*

By the practice of a Wesleyan congregation, certain of its members were appointed stewards for a given circuit, and were called circuit stewards. One of their duties was to take and furnish houses for their ministers officiating within the circuit. The rent of such houses were sometimes paid by the circuit stewards, and sometimes by the ministers; if by the ministers, the stewards repaid them the amount, together with the amount of the rates and taxes in respect of the houses, which were paid by the ministers in the first instance. It was the custom of the congregation to appoint a minister to officiate in a given place for one year certain, during which he could not be removed; and no minister officiated for more than three years in the same place.

At Michaelmas, 1832, the circuit stewards took and furnished a house at C., a place in the circuit, for a year certain, at the rent of 20*l.*, as a residence for W., who was then appointed to be minister at C. W. immediately took possession and occupied the house, as minister, till Michaelmas, 1835. During the three years of his occupation, W. paid the annual rent of 20*l.* for the house to the landlord; he was also in each of those years assessed to and paid the poor-rates for C. Both rent and poor-rates, however, were repaid to him by the circuit stewards.

Held, that W. did not gain a settlement in C. by renting a tenement, or by assessment to and payment of rates and taxes, under stats. 6 G. 4, c. 57, s. 2; 1 W. 4, c. 18, s. 1; and 4 & 5 W. 4, c. 76, s. 66.

CASE stated by consent, and by Judge's order, under stat. 12 & 13 Vict. c. 45, s. 11, for the opinion of this Court, upon an appeal to the Gloucestershire Quarter Sessions for Michaelmas, 1860, against an order of two justices, adjudicating the settlement of Benjamin Holmes Worth, a pauper lunatic, to be in the parish of Tiverton, in the county of Devon, and also ordering the payment by that parish of certain moneys expended in and about his maintenance, &c., and of the expense of his future maintenance.

***556]** *The said pauper lunatic was the legitimate son of William Worth, a Wesleyan minister, and of Susan Worth. The said William Worth was born in the parish of Tiverton, in or about the month of January, 1781. The respondents alleged that the pauper lunatic had no other settlement than this the birth settlement of his father; while the appellants relied on a subsequent settlement gained by the father in the parish of Carisbrook, in the Isle of Wight. From the year 1832 to the year 1835, both inclusive, the said William Worth was a Wesleyan minister, and the practice of the Wesleyan congregation, of which he was a minister, during that period, was as follows. Certain members of the congregation were appointed stewards for a circuit*

comprised within a given distance, and were called circuit stewards; and one of the duties of such circuit stewards was to take houses within their circuit as residences for their ministers officiating within such circuits; and to furnish such houses with furniture fit and proper for such residences. Sometimes the circuit stewards paid the rents of such houses, and sometimes the ministers, but in the latter case the amount of the rent so paid by the ministers was repaid to them by the circuit stewards; in like manner the amount of the rates and taxes paid by the minister in respect of such house was repaid to the said minister by the said circuit stewards. In the year 1832, the circuit stewards of the circuit within which the parish of Carisbrook, in the county of Southampton, in the Isle of Wight, was situate, in conformity with the aforesaid practice, *bonâ fide* took and rented a tenement situated in the said parish of Carisbrook, such tenement consisting of a separate and distinct dwelling-house and garden, as a residence for their minister officiating in *that part of the said circuit; and furnished the said dwelling-house with furniture fit and proper [*557 for such residence. And the said circuit stewards *bonâ fide* took and rented the said tenement, so situate in the said parish of Carisbrook, such tenement consisting of a separate and distinct dwelling-house and garden, for the term of one whole year from 29th September, 1832, at and for the rent of 20*l.* a year, that being also the yearly value of the said tenement, as a residence for their minister officiating in that part of the said circuit; and on the said 29th September, 1832, the said tenement having been so as aforesaid taken and rented by the said stewards, the said William Worth, having been appointed to officiate as such minister in that part of the said circuit, and continuing to be such minister from that time until and upon 29th September, 1835, with the consent of the said circuit stewards, as such minister, came to reside in and occupy, and as such minister resided in and occupied, the said tenement, the said dwelling-house being so furnished as aforesaid, under the said yearly taking for the term of one whole year (that is to say), upon and from the said 29th September, 1832, until and upon the 29th September, 1833, and so on afterwards on the same terms, from the said 29th September, 1833, until and upon the 29th September, 1835. The said William Worth actually paid the said rent of 20*l.* for the said tenement, to the landlord thereof, for each of the said years during which he so resided in and occupied the said tenement, but the amount of such rent was afterwards repaid to him by the said circuit stewards.

The said William Worth, in and during each of the said years in which he so resided in and occupied the said tenement, was assessed to the poor-rates for the *said parish of Carisbrook in respect of the said tenement, and paid such rates, and resided in and occupied such tenement for forty days and upwards, in each of the said years, after payment of the said rates. The amount so paid by him for the said rates was repaid to him by the said circuit stewards in conformity with the practice aforesaid. The said William Worth was appointed to officiate as minister at Carisbrook, in conformity with the custom of the Wesleyans, which custom is to appoint their ministers to officiate in a given place for one year certain. The appointment is absolute. During the year a minister cannot be re-

moved from the place of his appointment. It is also the custom that no minister shall officiate longer than three years in any one place.

The questions for the opinion of the Court were. First, did the pauper lunatic's father, William Worth, acquire a settlement in the said parish of Carisbrook, by renting the said tenement under the circumstances set forth? Secondly, did he acquire a settlement in the said parish of Carisbrook, by being assessed to and paying the poor-rates for the said parish, under the circumstances set forth?

If the decision of the Court should be in the affirmative on either of these questions, judgment was to be entered for the appellants, that the said order of the said justices be quashed at the Quarter Sessions for the county of Gloucester next or next but one after such decision was given. If the decision of the Court should be in the negative on both of these questions, judgment in like manner was to be entered for the respondents, that the said order be affirmed: with such costs, in either event, as this Court should adjudge.

*559] *Sawyer*, for the respondents.—Both questions must be answered in the negative. First, the pauper lunatic's father did not acquire a settlement in Carisbrook by renting a tenement. The acquisition of such a settlement is regulated by stats. 6 G. 4, c. 57, and 1 W. 4, c. 18. By stat. 6 G. 4, c. 57, s. 2, it is enacted, "That no person shall acquire a settlement in any parish" "maintaining its own poor, by or by reason of settling upon, renting or paying parochial taxes for any tenement, not being his or her own property, unless such tenement shall consist of a separate and distinct dwelling-house or building" "bonâ fide rented by such person, in such parish," "at and for the sum of 10*l.* a year at the least, for the term of one whole year; nor unless such house or building" "shall be occupied under such yearly hiring, and the rent for the same, to the amount of ten pounds, actually paid, for the term of one whole year at the least." Stat. 1 W. 4, c. 18, which was passed to explain an ambiguity in the former Act, enacts, by sect. 1, that, thereafter, the settlement shall not be acquired, unless the house or building "shall be actually occupied under such yearly hiring" "by the person hiring the same, for the term of one whole year at the least, and unless the rent for the same, to the amount of 10*l.* at the least, shall be paid by the person hiring the same." In the present case, the pauper's father, though he actually occupied the house in Carisbrook, was not the person who hired it, it having been hired by the circuit stewards. The same objection applies to his payment of the rent; if, indeed, he can be said to have paid it, having been repaid the amount by the stewards. The relation of landlord and *tenant never existed between him and the owner of the *560] house. Secondly, the pauper's father acquired no settlement by being assessed to and paying the poor rates in Carisbrook. By stat. 6 G. 4, c. 57, s. 2, no person is to acquire a settlement by "paying parochial taxes for any tenement," unless the other requirements of the section are also complied with. Stat. 4 & 5 W. 4, c. 76, s. 66, which enacts that from the time of the passing of that Act "no settlement shall be acquired or completed by occupying a tenement, unless the person occupying the same shall have been assessed to the poor-rate, and shall have paid the same, in respect of such tenement, for one year," leaves the former law, as to what is necessary to constitute

an occupation, unaltered; merely specifying the poor-rate as that parochial tax, assessment to and payment of which is to be a sine qua non to the acquisition of the settlement, however complete in other respects. (He was then stopped.)

Kingdon, for the appellants.—Sufficient facts are stated in the case to enable the Court to draw the conclusion that the pauper's father was the tenant of the premises at Carisbrook, which he occupied for three years, during all which time he paid the rent and the poor-rates for them. He entered into possession for the term of one whole year: for the case finds that his appointment as minister at Carisbrook was absolute for a year certain. [CROMPTON, J.—It is the custom to appoint the minister for a year; but there was no obligation on the circuit stewards to keep Mr. Worth in the same house for that period.]

*Per CURIAM.(a)—There must be judgment for the respondents.—The pauper's father did not rent or hire the house at Carisbrook. He was very much in the position of a servant to the circuit stewards; who put him into the house taken by them, from which they could have removed him at their pleasure. [*561]

Judgment for the respondents.

(a) Crompton and Hill, Js.

The QUEEN v. The Recorder of LEEDS. Jan. 24.

Overseers of a parish, on which an order of removal of a pauper had been made by two borough justices, gave notice of an appeal against the order to the next Quarter Sessions for the county in which the borough was situate. The borough had a separate Court of Quarter Sessions, which alone had jurisdiction to hear the appeal. The day before the Borough Sessions next after the notice of appeal were held, the appellants gave notice to the respondents that, finding that the Sessions for the county had no jurisdiction, they abandoned the appeal. The appellants did not appear, and the respondents did, at the Borough Sessions; which Court, on the application of the respondents, dismissed the appeal, and made an order for the payment by the appellants to the respondents of the costs incurred by the latter in the appeal.

Held, discharging a rule for a certiorari to bring up this order, that the order was rightly made. That the Borough Sessions would have had jurisdiction to hear the appeal, if persisted in; the erroneous statement in the notice of appeal that the appeal would be made to the County Sessions being merely surplusage: and that, upon the abandonment of the appeal, the Borough Sessions had jurisdiction under stat. 12 & 13 Vict. c. 45, s. 6, to make the order.

SHAW, in last Michaelmas Term, obtained a rule, calling on the Recorder of Leeds to show cause why a certiorari should not issue to bring up an order, made by him, for the payment by the overseers of the township of Applethwaite, in the county of Westmoreland, to the overseers of the township of Leeds, in the borough of Leeds, in the West Riding of the county of York, of the costs incurred by the latter as respondents in an appeal against an order of removal of a pauper from the said parish of Leeds to the said parish of Applethwaite.

*The following facts appeared from the affidavits.

The order of removal, having been made on 27th June, 1860, [*562] by two justices acting in and for the borough of Leeds, was served on the appellants on 4th July, 1860, together with the grounds of removal.

On 19th July, notice of appeal was served on the respondents by the appellants, stating that they "intended at the next general Quarter Sessions of the Peace to be holden in and for the West Riding of the county of York, at Leeds, in the said county, to appeal against the said order." On 27th August, a similar notice, accompanied with grounds of appeal, was also served. On 8th October, the respondents' attorney wrote to the appellants' attorney, giving notice that, on the hearing of the appeal, the Court would be moved to amend one of the grounds of settlement. On 8th October, the appellants' attorney wrote the following letter, which was received by the respondents' attorney on the 9th.

"Sir, " Kent Street, Kendal, October 8th, 1860.
 "The overseers of the poor of Applethwaite, in the township of Windermere, in the county of Westmoreland, have received a notice that the respondents intend to move the Court to amend the fifth ground of settlement; and, if the appeal proceeds, the service of such notice will be admitted. It is necessary, however, that I should state to you that the notice of appeal has been given to the next General Quarter Sessions of the Peace, to be holden in and for the West Riding of the county of York, at Leeds, in the said county; since the service of which notice it has occurred to me that, Leeds having a separate Court of Quarter Sessions as a borough, the appeal ought to have been tried there, and cannot, without your consent, be *563] tried at the Quarter Sessions for the county. I have therefore to ask you if you will consent to waive this objection, and permit the appeal to be tried pursuant to the notice of appeal which we have given. If not, the Sessions for the county having no jurisdiction, you will consider this a notice that the appeal is abandoned. In case the appeal proceeds, I shall of course, admit the service of the order and grounds of removal, you admitting the service of notice and grounds of appeal; and I am prepared also to abandon some of the grounds of appeal stated. An immediate answer will oblige

"Yours obediently,
 "RICHARD WILSON."

"Ch. Naylor, Esq., Solicitor, Leeds."

To which the respondent's attorney replied as follows:

"Sir, " Leeds, October 9th, 1860.
 "I cannot advise my clients to consent to this appeal being tried by the Court of Quarter Sessions for the West Riding of the county of York. I shall, therefore, on behalf of the respondents, accept your letter of yesterday, received this morning, as a notice of abandonment of your appeal, as requested by you. Yours, &c.

"CHARLES NAYLOR"

The Leeds Borough Sessions were held on 10th October, and, the appellants not appearing, the respondents moved by counsel that the appeal be dismissed with costs. Thereupon the recorder made the order in question, which, after reciting the order of removal and the notice of appeal in the terms above set out; that the appellants had subsequently abandoned the appeal; and that satisfactory proof of the above had been adduced at the General Quarter Sessions holden at Leeds, in and for the said borough (being the Court of General Quarter

Sessions to which the appeal, if it had been *proceeded with, [564 ought to have been brought, and which Court alone had jurisdiction over the same); proceeded to order the costs in law incurred by the respondents in the said appeal, to be paid to them by the appellants. Notice was sent on 10th October by the respondents, and received by the attorney of the appellants on the 11th, that the appeal had been dismissed with costs, and that the taxation would take place on Friday the 12th. The trial of appeals had been postponed by the Recorder to that day, but no application was made during the Sessions on behalf of the appellants.

The Quarter Sessions for the West Riding were held at Leeds on 15th October. It was sworn by the appellants' attorney that they never had any intention to try at the Borough Sessions; and by the respondents' attorney, that they were prepared to have tried at the Borough Sessions, knowing that those Sessions alone had jurisdiction.

J. B. Maule now showed cause.—The Recorder had jurisdiction to make the order. Notwithstanding that the appellants gave notice of appeal to the County Sessions they could have compelled the Recorder to hear it; the only proper tribunal being the Borough Sessions, and the erroneous statement in the notice, that the appeal would be made to the County Sessions, being merely surplusage, not invalidating the notice: *Regina v. Recorder of Liverpool*, 15 Q. B. 1070 (E. C. L. R. vol. 69); *Regina v. Justices of Buckinghamshire*, 4 E. & 259, note (E. C. L. R. vol. 82). The respondents, therefore, were bound to act upon the notice of appeal by preparing to meet the appellants before the Recorder. And the Recorder, upon proof of *the [565 notice of appeal, and upon the non-appearance of the appellants to prosecute the appeal, was authorized to make the order for the payment of costs by the appellants to the respondents, by stat. 12 & 13 Vict. c. 45, s. 6, which enacts, "That any Court of General or Quarter Sessions of the peace, upon proof of notice of any appeal to the same Court having been given to the party or parties entitled to receive the same, though such appeal was not afterwards prosecuted or entered, may, if it so think fit, at the same Sessions for which such notice was given, order to the party or parties receiving the same such costs and charges as by the said Court shall be thought reasonable and just to be paid by the party or parties giving such notice." That enactment confers upon all Courts of Quarter Sessions the same power, in this respect, which was given by stat. 8 & 9 W. 3, c. 30, s. 3, to Courts of Quarter Sessions for counties or ridings.

Shaw, in support of the rule.—The Recorder had not jurisdiction to make the order, under stat. 12 & 13 Vict. c. 45, s. 6; notice of appeal to his Court not having been given, but to the County Court of Sessions. The appellants not only did not give notice of appeal to the Borough Sessions, but they never had any intention to try the appeal there. [CROMPTON, J.—How can the intention in the mind of the parties giving the notice have any effect upon the validity or invalidity of the notice itself?] In *Regina v. Justices of Salop*, 4 E. & B. 257 (E. C. L. R. vol. 82), it was held that a notice of appeal to Borough Sessions could not be treated as a notice of appeal to the County *Sessions, in a case where the appeal lay to the latter [566 only, after the appellants had acted on the notice by appearing

at the Borough Sessions and endeavouring to have the appeal heard there. And the Court distinguished *Regina v. Recorder of Liverpool*, 15 Q. B. 1070 (E. C. L. R. vol. 69), on the ground that the appellants, there, had not acted on their erroneous notice. In the present case, the appellants, throughout, acted on their notice as a notice of appeal to the County Sessions; the only difference between their proceedings and those of the appellants in *Regina v. Justices of Salop*, 4 E. & B. 257 (E. C. L. R. vol. 82), being, that they did not go so far as to run up unnecessary costs by attending at the County Sessions, but abandoned the appeal the day before those Sessions. [HILL, J.—That is a material distinction between the two cases. In *Regina v. Justices of Salop*, the notice of appeal had performed its office, when the appellants appeared at the Sessions for which it was given; but the present appellants did not thus act upon the notice which they had given.] The respondents ought to have applied to the County Sessions for their costs: according to the dictum of Erle, J., in *Regina v. Justices of Salop*, who there says, “The Borough Sessions” (the wrong Sessions to try the appeal, but the Sessions notice of appeal to which had been given) “had so far jurisdiction in consequence of the mistaken notice, that they might have given the respondents costs.”

(COCKBURN, C. J., and WIGHTMAN, J., were absent.)

*567] CROMPTON, J.—I am of opinion that this rule must be discharged. After the decision in *Regina v. Recorder of Liverpool*, 15 Q. B. 1070 (E. C. L. R. vol. 69), the respondents, on the receipt of the notice of appeal, were entitled to suppose that, notwithstanding the mistake in it, they would be called before the right tribunal, namely, the Leeds Borough Sessions. The Recorder of Leeds had jurisdiction over the appeal, and it is clear that, upon the abandonment of the appeal, he had jurisdiction to make an order, giving the respondents their costs. I cannot see how we can say that the Recorder was wrong, unless we overrule *Regina v. Recorder of Liverpool*. No doubt, if Mr. Wilson's letter to Mr. Naylor, of 8th October, 1860, had been written earlier, it would have prevented the respondents in incurring costs in preparing to resist the appeal; but the delay does not prevent the costs so incurred, up to the time of the receipt of the letter, from being costs to which the respondents were entitled. Inasmuch, however, as that letter ought to have been written more promptly, I think that the rule should be discharged without costs.

HILL, J.—I am of the same opinion. We could not make this rule absolute, unless we held that the Recorder had no jurisdiction over the appeal; to do which would be to overrule *Regina v. Recorder of Liverpool*. The appellants gave a notice of appeal which they might have acted upon as a good notice of appeal to the Leeds Borough Sessions; and the notice of abandonment of the appeal gave the Recorder jurisdiction to give the respondents their costs. I think, however, that the rule should be discharged, without costs, on two *568] grounds: *first, because the conduct of the respondents' attorney was disingenuous: secondly, because the affidavit which he has filed, on showing cause, is very improperly prepared, contains mere repetitions of what had already been sworn to, and must have been so framed with a view, not to informing the Court, but to increasing the costs. Rule discharged, without costs.

DUTTON v. POWLES. Jan. 25.

[Reported, in the Queen's Bench, and in the Exchequer Chamber on error from that Court, 2 B. & S. 174 (E. C. L. R. vol. 110).]

The QUEEN, on the prosecution of HENRY BURTON, Respondent, v. ISAAC AULTON, Appellant. Jan. 26.

Earthenware jugs or drinking cups, ordinarily used as imperial measures by a publican in his business, are, although not stamped as measures, and exempted by stat. 5 & 6 W. 4, c. 63, s. 21, from being so stamped, nevertheless "measures" within the meaning of sect. 28 of that Act, which empowers any authorized inspector of weights and measures to enter any shop or place within his jurisdiction, in which goods are exposed and kept for sale, and there to examine all measures, and to compare and try them with the copies of the imperial standard measures required by the Act to be provided: and renders measures, found on such examination to be unjust, liable to be seized and forfeited; and the person in whose possession they are found to be convicted in a penalty.

ON appeal to the Worcestershire Quarter Sessions by Isaac Aulton, against a conviction of him by two justices under stat. 5 & 6 W. 4, c. 63, the Sessions affirmed the conviction, subject to the opinion of this Court on the following case.

*The appellant, before and at the time of the seizure herein- [569 after mentioned, was a licensed victualler and retailer of beer in Dudley, in the county of Worcester, and sold beer to customers out of the house, and to customers to drink in the house, the beer in the latter case being supplied sometimes outside the bar, sometimes within the bar, and sometimes in the parlour.

The respondent, Henry Burton, is the inspector of weights and measures for the district of Dudley. On 23d August, 1859, he entered the appellant's house for the purpose of examining the appellant's measures. He there found the appellant's wife, and told her that he was come to inspect her measures. She thereupon produced a number of measures, which he examined and found to be correct. On a shelf in the bar, on the lefthand side, apart from those measures, were nine earthenware cups. The inspector said to appellant's wife "I must try those also." She said, "They are cups, and we only use them for the parlour; you will not find them measure." The inspector, however, insisted upon trying them, and the cups were handed to him. He tested them with a measure, found by the Sessions to be a copy of the imperial pint measure, and found them to contain three-quarters of a quarten less than the said measure. These cups were without stamp or mark. The same price was charged for the beer sold in them as in the stamped pint measures, but some of the witnesses stated that when beer was supplied to them in those cups they did not suppose that they were receiving a full pint; whilst other witnesses said that when they were served with beer in those cups they meant to have and thought they were getting a pint of beer, for which they paid the usual full price. The inspector seized the said cups *as being unjust measures, and caused an information to be laid against the appellant to recover the penalties alleged to [570

have become payable by reason of his having unjust measures in his possession.

The case came on for hearing before the justices on 5th September then following, when the appellant was convicted and adjudged to pay the penalty of 9s. and costs. The conviction purported to be "for that the said Isaac Aulton, on 23d August, 1859, at the parish of Dudley, in the county of Worcester, unlawfully had in his possession, in a certain shop there, being the shop of the said Isaac Aulton, wherein goods were then kept for sale by measure, nine measures, purporting respectively to be pint measures; all of which said measures, so purporting respectively to be pint measures, were, upon examination thereof duly made on the day and year aforesaid, according to the statute in that behalf, in the said shop, by Henry Burton, an inspector of weights and measures duly appointed in that behalf for the district wherein the said shop is situate, and having jurisdiction in the premises, and being duly authorized in writing for that purpose, under the hand of" a Justice of the Peace for Worcestershire, "found to be unjust, contrary to stat. 5 & 6 W. 4, c. 63." The conviction concluded, "And we do adjudge that the said Isaac Aulton has forfeited for his said offence the sum of 9s."

At the Quarter Sessions it was contended for the appellant, on grounds of appeal which raised the objections, First. That the conviction was bad for not stating an adjudication as to the costs, and mode of enforcing payment thereof.

Secondly. That unstamped earthenware jugs, or drinking cups, ordinarily used as measures, are not "measures" within the meaning of the 28th section of stat. 5 & 6 W. 4, c. 63.

The Court of Quarter Sessions overruled these objections, and found that the cups in question had been ordinarily used by the appellant as pint measures, but not otherwise represented to be pint measures.

If the Court of Queen's Bench should be of opinion that either objection ought to prevail, the conviction was to be quashed: otherwise the judgment of the Sessions was to be affirmed, with such further costs as the Court might direct.

Welsby for the respondent, in support of the conviction. (*D. D. Keane*, contra, abandoned the first ground of appeal.)—The earthenware cups in question were "measures" within the meaning of stat. 5 & 6 W. 4, c. 63, s. 28, under which the appellant was convicted. Sect. 6 of that Act abolishes all local or customary measures, and subjects to a penalty every person who shall sell by any denomination of measures other than one of the imperial measures, or some multiple or aliquot part thereof: with a proviso "that nothing" therein "contained shall prevent the sale of articles in any vessel, where such vessel is not represented as containing any amount of imperial measure, or of any fixed, local, or customary measure heretofore in use." Sect. 12 enacts that all measures of capacity which shall be made after the passing of the Act shall have their contents denominated, stamped, or marked on the outside, in legible figures and letters. Sect. 21 exempts from being stamped "any glass or earthenware jug or drinking cup, though represented as containing the amount of any imperial measure, or of any multiple thereof." Then "sect. 28 empowers any authorized inspector of weights and measures "to enter

any shop, store, warehouse, stall, yard, or place whatsoever within his jurisdiction, wherein goods shall be exposed or kept for sale," "and there to examine all weights and measures," &c., "and to compare and try the same with the copies of the imperial standard weights and measures required or authorized to be provided under" the "Act; and if upon such examination it shall appear that the said weights or measures are light or otherwise unjust, the same shall be liable to be seized and forfeited; and the person or persons in whose possession the same shall be found shall, on conviction, forfeit a sum not exceeding 5*l*." In the present case, the Sessions have found as a fact that the cups in question had been ordinarily used by the appellant as pint measures. Although, therefore, they were made of earthenware, and as such did not, by reason of sect. 21, require to be stamped, their ordinary use, as pint measures, by the appellant, amounted to a representation, within the meaning of sect. 6, that they contained imperial pints; or, in other words, that they were "measures" within the meaning of sect. 28. *Washington v. Young*, 5 Exch. 403, is directly in point to show that the ordinary use of earthenware vessels as measures constitutes them measures subject to the operation of the Act. (He was then stopped.)

D. D. Keane, contra.—The conviction states that the appellant was convicted for unlawfully having in his possession, in his shop, "nine measures, purporting respectively to be pint measures," but not being such. *But inasmuch as the cups, being earthenware, were, in accordance with sect. 21 of the Act, left unstamped, they could not purport to be measures, and a conviction of the appellant under sect. 28 was wrong. Proceedings should have been taken against him for the use of earthen vessels untruly represented to contain imperial pints, and thus not within the protection of the proviso in sect. 6. [*CROMPTON, J.*—*Washington v. Young*, 5 Exch. 403, appears to be directly in point against you; and, as being the decision of a Court of co-ordinate jurisdiction, is binding upon us.] The Court will scarcely follow that decision if it does not concur in it, in a case where, as in the present, there is no appeal. Either that decision was erroneous, or it is distinguishable from the present case. Sect. 28 of the Act applies to such measures only as bear a denomination of their capacity upon the face of them, and so purport to be measures.

(*COCKBURN, C. J.*, was absent, and *WIGHTMAN, J.*, left the Court before the conclusion of the argument.)

CROMPTON, J.—We should be bound by *Washington v. Young*, 5 Exch. 403, even if we did not agree with it: I, however, entirely concur with the Court of Exchequer in that decision.

HILL, J.—We are clearly bound by *Washington v. Young*, which moreover is, in my opinion, good law. If an earthenware vessel, although not stamped as a measure, is ordinarily used as containing a certain *definite amount of imperial measure, and is found by the inspector to be unjust, as not containing that amount, it is liable to be seized and forfeited, and the person using it is liable to a penalty, under sect. 28 of the Act of Parliament.

Conviction affirmed, with costs.

The Overseers of EAST DEAN, Appellants, v. JOHN EVERETT
Respondent. Jan. 26.

Stat. 43 Eliz. c. 2, s. 4, empowers "as well" "the present as subsequent" "overseers, or any of them," by warrant from two justices, to levy all arrears due for poor-rate, by distress and sale of the offender's goods. Stat. 17 G. 2, c. 38, s. 11, enacts that, in case any person shall refuse or neglect to pay the overseers by whom a poor-rate is made, any sum at which he is legally rated, "the succeeding overseers" may levy such arrears, and out of the money so levied reimburse their predecessors all sums of money expended by them for the use of the poor.

Held, that the latter statute does not restrict the power conferred by the former to overseers immediately succeeding those by whom a poor-rate is made, but that any overseers, subsequent to those making the rate, are still entitled to procure a distress warrant from justices to enforce payment of arrears of the rate by defaulters.

CASE stated, under stat. 20 & 21 Vict. c. 43, by justices in Petty Sessions for the Newnham division of the county of Gloucester.

The respondent was summoned by the appellants, the overseers of the township of East Dean, in the said county, for non-payment of two poor-rates for that township, made on 1st January, 1858, and 16th June, 1858, respectively.

The overseers who made the said rates continued in office until 25th March, 1859, at which time other persons were appointed, who remained in office until 25th March, 1860, when the appellants were appointed.

The respondent appeared in accordance with the summons, and the
*575] justices, upon the hearing, decided that "the appellants could not recover the said rates, because they were of opinion that a poor-rate cannot be recovered except by those who made it, or by those who may be the overseers in the year next after that in which it was made."

The question for the opinion of the Court was, Whether, upon the facts stated in the case, the justices ought to have made an order for the payment of the said rates by the respondent, and to have granted a warrant of distress.

Hopwood, for the appellants, in support of the complaint.—The justices came to a wrong decision. Stat. 17 G. 2, c. 38, s. 11, enacts, "That in case any person or persons shall refuse or neglect to pay to such overseers as aforesaid," that is, the overseers who make the rate, "any sum or sums of money that he, she, or they shall be legally rated or assessed to, it shall and may be lawful to and for the succeeding overseers, and they are hereby required to levy such arrears, and out of the money so levied to reimburse their predecessors all sums of money which they have expended for the use of the poor." The justices appear to have decided the case with reference solely to this enactment, and to have interpreted the words "the succeeding overseers" as equivalent to "the overseers immediately succeeding." Whether or not, however, that is the proper construction, the original statute under which poor-rates were first imposed, 43 Eliz. c. 2, is still in full force, and by sect. 4 enacts "that it shall be lawful, as well for the present as subsequent churchwardens and overseers,
*576] or any of them, by warrant from any two" "justices," "to levy" "all arrearages, of every one that shall refuse to contribute according as they shall be assessed, by distress and sale of the

offender's goods." That enactment evidently applies to any subsequent overseers, not to those, only, who immediately succeed the overseers making the rate; whatever may be the proper construction of stat. 17 G. 2, c. 38, s. 11, in which "succeeding" is used instead of "subsequent." Had the Legislature, by the Act of George 2, intended to restrict the power conferred by the statute of Elizabeth to the immediately succeeding overseers, they would have done so by express words; as may be inferred from the language of stat. 11 & 12 Vict. c. 91, s. 1, which enacts "That if the overseers of the poor in any parish shall lawfully, by virtue of their office, contract any debt on account of the parish within three months prior to the termination of their year of office, and the same shall not have been discharged by them before their year of office shall have determined, such debt shall be payable by and recoverable from their immediate successors in office, and chargeable upon the poor-rate of the said parish, in like manner as the same would have been payable and chargeable by such first-mentioned overseers during their year of office." (He was then stopped.)

(No one appeared for the respondent.)

COCKBURN, C. J.—I am of opinion that the justices ought to have issued their warrant of distress to enforce these rates. But for the language of stat. 17 G. 2, c. 38, s. 11, no doubt could have arisen on the subject. Under stat. 43 Eliz. c. 2, s. 4, if a person rated to the *poor-rate does not pay his quota to the overseers who make [577 the rate, he can be compelled by any subsequent overseers to pay. And stat. 17 G. 2, c. 38, s. 11, was not intended to abrogate the rights of any subsequent overseers; but, rather, to relieve from liability outgoing overseers who had not collected all the rates accrued due during their year of office: enabling, as it does, the succeeding overseers to do it for them, and reimburse them out of the amount levied. Both common sense and justice require that a man should not be allowed, by delaying payment of a rate lawfully imposed upon him, to evade payment altogether. I am clearly of opinion that the appellants, being "subsequent overseers," are entitled, under the statute of Elizabeth, to enforce payment of arrears of poor-rate, though such rate was not made by their immediate predecessors. The case must go back to the justices with that expression of our opinion. Probably, at the hearing of the complaint, stat. 17 G. 2, c. 38, only, was brought to their notice.

(WIGHTMAN, J., was absent.)

CROMPTON and HILL, Js., concurred.

Case remitted to the justices.

*578J *BATEMAN v. FRESTON.(a) Jan. 21; Jan. 24; Jan. 26.

The examination of defendant, a bankrupt, commenced on 6th November, and was adjourned to 3d December, 1860. On 29th November the bankruptcy Commissioner, at the instance of O., a creditor of defendant, who had proved his debt, issued a certificate, under The Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, s. 257, Schedule B a., withdrawing protection from defendant. O. sued out of the Court of Exchequer a ca. sa. upon this certificate, under which the sheriff arrested defendant on 1st December. In January, 1861, defendant being still in custody under that ca. sa., the Commissioner granted plaintiff, also a creditor, a similar certificate, under which a ca. sa. sued out of this Court, was in the same month lodged with the sheriff, as a detainer against defendant.

Held, discharging a rule calling on plaintiff to show cause why defendant should not be discharged from custody as to this last ca. sa., that defendant was legally detained in custody under it. That, assuming that stat. 12 & 13 Vict. c. 106, s. 112, gives a bankrupt an absolute statutory protection from arrest till the day fixed for his final examination, so that the original arrest of defendant was illegal, the detainer lodged by plaintiff was nevertheless good, not having been lodged until after defendant's privilege from arrest had ceased. That the principle applicable to such cases is, that whenever an arrest by a detaining party would have been good, a detainer by him, being equivalent to an arrest, will be good also, unless it appears that the first arrest was a wrongful act of the sheriff himself, or that there was some collusion between the detaining party and the creditor making the arrest, or between the detaining party and the sheriff.

GRAY moved, on behalf of the defendant, for a rule calling on the plaintiff to show cause why the defendant should not be discharged from the custody of the keeper of the Queen's prison, as to the ca. sa. issued at the suit of the plaintiff.

It appeared that the defendant Freston was adjudicated a bankrupt by the Bristol District Court on 17th September, 1860, on which day, not being then in prison or in custody, he surrendered. On 2d October, the first meeting was held, and assignees were chosen. At the second meeting, on 6th November, the examination of the bankrupt was commenced, and adjourned to 3d December. On 29th November, the Commissioner issued a certificate under The Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, s. 257, Schedule B a., withdrawing protection from the bankrupt, at the instance
*579J *of one James Viner Ockford, a creditor who had proved his debt; and the bankrupt was arrested by the sheriff of Middlesex, on 1st December, under a ca. sa. issued out of the Court of Exchequer at the suit of Ockford. On 4th December, another ca. sa. was delivered to the sheriff, which had issued out of the same Court on the same day, at the suit of another creditor, Joseph Chapman, upon another certificate of the Commissioner, given on 3d December, after the termination of the adjourned meeting. On 15th January, 1861, another ca. sa. was lodged with the sheriff against Freston (who was still in custody), issued from this Court at the suit of the plaintiff, also a creditor, on another certificate of the Commissioner, granted a day or two previously.

Gray (having previously applied to Martin, B., at Chambers, who referred him to the Court), had obtained a rule in the Court of Exchequer, on the first day of this Term, to set aside the ca. sa. issued at the suit of Ockford, and to discharge Freston from the custody of the keeper of the Queen's prison, on the ground that the certificate and ca. sa. were granted and issued, and the arrest took place, when he was a bankrupt having privilege from arrest under The Bankrupt

(a) See note (a) at the end of this case, post, p. 588.

Law Consolidation Act, 1849; and also a rule to discharge him, as to the ca. sa. at the suit of Chapman, on the ground that it was lodged against him, and he was detained under it, while in such illegal custody: and that Court, on 18th of January, made both rules absolute.(a)

Gray, for his rule.(b)—As the Court of Exchequer have already decided in the similar case of the ca. sa. issued *out of that Court at the suit of Chapman, the bankrupt is entitled to his discharge. The bankrupt's original arrest, on Ockford's ca. sa., was illegal, that writ having been founded on the certificate granted by the Commissioner on 29th November, and having been executed on 1st December, both which days preceded the day (8d December) fixed for the bankrupt's final examination. The Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, s. 112, enacts, "That if the bankrupt be not in prison or custody at the date of the adjudication, he shall be free from arrest or imprisonment by any creditor in coming to surrender, and after such surrender, during the time by this Act limited for such surrender, and for such further time as shall be allowed him for finishing his examination, and for such time after finishing his examination until his certificate be allowed as the Court shall from time to time by endorsement upon the summons of such bankrupt think fit to appoint." This amounts to an absolute statutory protection of the bankrupt against arrest until the expiration of the time allowed him for finishing his examination, which time, in the present case, did not expire till 8d December. *Ex parte Leigh*, 1 Glyn & J. 264, decided on the similar enactment then in force, 6 G. 4, c. 16, s. 117, shows that the protection is conferred by the statute itself, and not by the Commissioner's endorsement on the summons. The Commissioner, therefore, had no power, on 29th November, to grant a certificate for Preston's arrest. Sect. 257, under which that certificate was granted, enacts "That" "every creditor of any bankrupt, immediately after the proof of his debt shall have been admitted, shall be *deemed a judgment creditor of such bankrupt to the extent of such proof; and the Court, when it shall have refused to grant the bankrupt any further protection, or shall have refused or suspended his certificate, shall, on the application of" "any such creditor, grant a certificate under the seal of the Court, in the form contained in schedule B a, to this Act annexed, and every such certificate shall have the effect of a judgment entered up in one of Her Majesty's superior Courts of common law at Westminster until the allowance of the certificate of conformity of such bankrupt; and the" "creditor to whom, according to such certificate, the bankrupt shall be indebted as therein mentioned, shall be thereupon entitled to issue and enforce a writ of execution against the body of such bankrupt." This section must be read with reference to sect. 112; and, when so read, clearly does not empower the Commissioner to grant a certificate until after the time during which the bankrupt is absolutely protected by sect. 112. The certificate of 29th November was therefore void, and the bankrupt's arrest under the ca. sa. founded upon it illegal. Indeed that arrest was illegal by reason of the bank-

(a) *Ockford v. Preston*, 6 H. & N. 466.

(b) Monday, January 31st, Thursday, January 24th.

rupt being then privileged by the statute from arrest, whether the commissioner's certificate in question was a nullity or not. And, the original arrest being illegal, it follows that all subsequent detainers of the bankrupt, lodged with the sheriff while the bankrupt was thus illegally in custody, were illegal also, there being nothing to found a valid detainer upon: *Barratt v. Price*, 9 Bing. 566 (E. C. L. R. vol. 23); *Barrack v. Newton*, 1 Q. B. 525 (E. C. L. R. vol. 41); *Hooper v. Lane*, 6 H. L. Ca. 443. [HILL, J.—The privilege from arrest of a *582] witness or suitor in a case may render invalid subsequent detainers of him, if he is arrested; but there is possibly a distinction between the position of a person privileged on such a ground and that of a person whose privilege expires at a given fixed time. Here, the bankrupt's protection had expired before the detainer was lodged under which he is now held in custody.] A bankrupt illegally arrested is in all cases entitled to his discharge: *Ex parte Hawkins*, 4 Ves. 691; *Ex parte King*, 7 Ves. 312; *Ex parte Donlevy*, 7 Ves. 317; *Sidgier v. Birch*, 9 Ves. 69; *Ogle's Case*, 1 Ves. 556; *Ex parte Ross*, 11 Rose 260. [CROMPTON, J.—Is there any authority which shows that a party, illegally arrested while privileged from arrest, cannot legally be detained in that arrest under a detainer lodged after the privilege has ceased?] In *Spence v. Stuart*, 3 East 89, it was held that a witness, arrested while his privilege redeundo from giving evidence before an arbitrator continued, could not be kept in custody under a detainer afterwards lodged against him. [HILL, J.—If your argument is correct, a bankrupt who is once illegally arrested may, by lying in prison till all the subsequent detainers which he has reason to apprehend are lodged, and then claiming his discharge, evade them all.] If the original arrest is illegal, so are all subsequent detainers. In *Archbold's Bankruptcy Practice*, p. 374 (ed. 11, by Flather), it is laid down, generally, that "where a bankrupt is entitled to his discharge upon an arrest, he will be discharged also from all detainers lodged against him after it took place:" "and the discharge must be *unconditional." The law is similarly stated in *583] *Chitty's Archbold's Practice*, vol. 1, p. 742 (ed. 10), and in *Montagu and Ayrton's Bankruptcy Practice*, vol. 1, p. 4+2. In all such cases, whether or not the sheriff is liable to an action for making the first arrest, the invalidity of that arrest avoids all subsequent detainers against the party arrested, at whatever time they may be lodged with the sheriff. The judgment of the Court of Exchequer in favour of the present defendant, in the case of *Chapman's ca. aa.*, which is on all fours with that now before the Court, is conclusive in the defendant's favour. With the exception of *Martin, B.* (who, however, did not dissent), none of the Judges in the other Court expressed any doubt as to the defendant's right to be discharged. [WIGHTMAN, J., referred to *Ex parte Cogg*, 6 D. P. C. 461, and HILL, J., to *Eggington's Case*, 2 E. & B. 717 (E. C. L. R. vol. 75).]

J. D. Coleridge (a) showed cause in the first instance.—First, the original arrest of the defendant was legal. The true construction of stat. 12 & 18 Vict. c. 106, s. 112, is, not that it absolutely protects a bankrupt from arrest until his first examination is over, but that it confers a protection conditional upon its not being withdrawn by the

(a) Thursday, January 24th.

Commissioner before that time. The decisions on the construction of the repealed statutes, cited on the other side, do not affect the question. The language of those statutes was different. Stat. 5 G. 2, c. 30, s. 5, conferred upon bankrupts freedom from arrest, for and during the forty-two days next after written notice of the issuing of the commission of *bankruptcy, and for such further time as should be allowed them for finishing their examinations. Stat. 6 G. 4, c. 16, s. 117, was to the same effect; and sect. 118 enacted, that it should be lawful for the Commissioners, at any time appointed for the last examination of the bankrupt, or any enlargement or adjournment thereof, to adjourn such examination sine die; and that the bankrupt should be free from arrest or imprisonment for such further time, not exceeding three calendar months, as the Commissioners should by endorsement upon the summons appoint. These statutes, therefore, gave the bankrupt absolute protection for forty-two days, and left the Commissioners no discretion, during that period, to withdraw it. But stat. 12 & 13 Vict. c. 106, s. 112, enacts that the protection shall be "for such" "time as shall be allowed" the bankrupt "for finishing his examination, and for such time after finishing his examination until his certificate be allowed as the Court shall from time to time by endorsement upon the summons of such bankrupt think fit to appoint." The enactment that the endorsement may be made made from "time to time" is new, and points to any time, and therefore to a time preceding, as well as following, the passing of his final examination by the bankrupt. The case was then adjourned.

J. D. Coleridge was now about to proceed with his argument, when he was stopped by *WIGHTMAN, J.*, who delivered the judgment of the Court (a) as follows.

In this case, the day fixed by adjournment for the last examination of the bankrupt was the 3d of December. *On the 29th of November, the Commissioner had granted a certificate, under [585 the 257th section of stat. 12 & 13 Vict. c. 106, to a creditor, which, if valid, would have the effect of a judgment, and under which a *ca. sa.* was issued out of the Court of Exchequer; and the bankrupt was arrested under it on the 1st of December, two days before the day fixed for his last examination. The Court of Exchequer held that the certificate of the Commissioner was invalid, and set aside the *capias*, and discharged the bankrupt from the arrest under it; and they also discharged the bankrupt, as against another creditor, who had whilst the bankrupt was in custody under the invalid certificate and *capias*, but after the adjourned meeting of the 3d of December, obtained a valid certificate from the Commissioner, and had lodged a detainer against him upon a *capias* issued upon that valid certificate. The Court of Exchequer discharged him from that detainer, on the ground that, as the original arrest was illegal, all subsequent detainers, until he was discharged from custody under the first, were illegal also. The bankrupt was also detained in custody under a *capias* issued out of this Court by another creditor, who had, after the 3d of December, obtained a certificate from the Commissioner; and the question before us is, whether the bankrupt is entitled to his discharge from that detainer.

In support of the bankrupt's claim to be discharged, it was said

(a) *Wightman, Crompton and Hill, Js.*

that, until the 3d of December, the day fixed for his final examination, the 112th section of stat. 12 & 13 Vict. c. 106, gave him an absolute statutory protection from arrest, and that, having been arrested by a creditor before that day, he was entitled to his discharge, not *586] only from that arrest, but from all *detainers lodged against him while he was in custody under that illegal arrest. In support of this proposition several cases were cited, in which it had been held that, if the original arrest is illegal, subsequent detainers lodged whilst the prisoner is in custody under the illegal arrest are inoperative, and the prisoner is entitled to be discharged from them; and it was said that this was more especially the case where the discharge from the original arrest was by reason of some personal privilege of the defendant: as in the case of a witness arrested on his way to or from the Court where he is to be a witness, or of a bankrupt who by the Bankruptcy Act is declared to be free from arrest or imprisonment during the time or further time allowed him for finishing his examination. It is not necessary to examine each of the cases cited in detail, some of them in the time of Lord Eldon; for in several of them it does not appear clearly, from the facts stated, whether the detainers were not lodged during the existence of the privilege or protection, in which case they would be subject to the same objection as the first arrest. This, indeed, appears to have been the ground on which the case of *Spence v. Stuart*, 3 East 89, was decided, and is consistent with the explanation of that case as given by the Court in the subsequent case of *Barclay v. Faber*, 2 B. & Ald. 743. But, however this may be, the subsequent case of *Barratt v. Price*, 9 Bing. 566 (E. C. L. R. vol. 23), recognised as it is in the case of *Robinson v. Yewens*, 5 M. & W. 149, as laying down the proper rule in such cases, and as good law by the House of Lords in the case of *Hooper v. Lane*, 6 H. L. Ca. 443, may be considered as having settled the *587] *principle on which the Courts should act upon such questions as that now before us. That principle appears to be this: that whenever an arrest by a detaining party would have been good, a detainer by him, being equivalent to an arrest, will be good also, unless it appears that the first arrest was a wrongful act of the sheriff himself, or that there was some collusion between him and the creditor making the arrest, or between him and the sheriff; and this seems consistent with reason and justice, as it would be a great hardship upon an innocent party to be prejudiced by the wrongful acts of other persons. The case of *Hooper v. Lane*, 6 H. L. Ca. 443, was decided upon the ground that the sheriff himself was a wrongdoer in making the first arrest, or that the detaining creditor acted in collusion with the sheriff or the arresting creditor; and it is clear that, as against the detaining creditor, the protection given by the statute would not have applied, had the bankrupt been arrested by him.

It is unnecessary to consider whether the certificate of the Commissioner of the 29th November was or was not invalid (though we are disposed to agree with the Court of Exchequer upon this point), for in either case the statutory protection from arrest until the 3d of December would have applied; but when that day was past, and no protection granted by the Court of Bankruptcy, there was nothing to prevent a creditor, who had proved his debt, from obtaining the

Commissioner's certificate, and issuing a ca. sa. and arresting the bankrupt under it.

We are told that the Court of Exchequer can hardly be said to have come to an unanimous judgment, as *Martin, B., is said [*588 to have expressed opinions very much at variance with those of the rest of the Court; but however this may be, and entertaining as we do the highest respect for that Court and its members, we cannot agree with them in the opinion they have formed upon this case; and, for the reasons we have given, we think that the rule should be discharged.

Rule discharged.(a)

(a) A writ of habeas corpus was subsequently obtained, on behalf of Freston, from the Court of Chancery, and on the return of that writ the full Court of Appeal in Chancery held that he was entitled to his discharge. *Ex parte Freston*, 30 L. J. N. S. Ch. 460.

TURNIDGE, Appellant, v. SHAW, Respondent. Nov. 28, 1860; Jan. 31.

Stat. 30 G. 2, c. 21, s. 5, enacts that, for the better preservation of the fishery of the river Thames, within the jurisdiction of the mayor of London, as conservator of the river, it shall be lawful "for the deputy of the said mayor for the time being, as conservator as aforesaid, commonly called the water bailiff, and his assistant or assistants," appointed by warrant under the hand and seal of the mayor, to enter the boat of any fisherman or other person fishing on the Thames, and seize all brood of fish found there. Sect. 6 imposes a penalty of 10*l.* on any person "who shall obstruct or hinder the said water bailiff" or "his assistants," "in the execution of any of the powers vested in them by this Act;" and sect. 11 gives a convicted person a right of appeal to the next Court of Conservancy.

The Thames Conservancy Act, 1857, 20 & 21 Vict. c. cxlvii., creates a new corporation, called "The conservators of the river Thames," and, by sect. 52, transfers to them "all the powers, authorities, rights and privileges," which might be exercised by the mayor of London, "by prescription, usage, charter, or Act of Parliament, or otherwise, with regard or relation to the conservancy and the preservation and regulation of the river Thames," save only so far as the same may be modified by, or be inconsistent with, the provisions of that Act. Sect. 76 imposes a penalty, not exceeding 5*l.*, on any person who "shall resist or make forcible opposition against any person employed in the due execution of this Act."

Held that, under the latter Act, although it does not apparently have the fishery of the Thames in contemplation, the conservators of the Thames are empowered to appoint, under their hands and seals, assistant river-keepers, with express authority to enter fishing boats and seize brood of fish, in pursuance of stat. 30 G. 2, c. 21, s. 5; and that a person obstructing such an assistant river-keeper in so doing, is not liable to the penalty imposed by sect. 6 of that statute; but is liable to the penalty imposed by stat. 20 & 21 Vict. c. cxlvii. s. 76.

CASE stated by justices of Essex, under stat. 20 & 21 Vict. c. 48.

*An information was preferred by Thomas Turnidge, of Leigh, in the said county, assistant river-keeper (the appellant), [*589 by direction of the conservators of the river Thames, against Thomas Shaw, of Leigh aforesaid, fisherman (the respondent), whereby the said Thomas Shaw was charged for that he did, on 11th January, 1860, at the parish of Leigh in the said county, obstruct and hinder the said Thomas Turnidge in the execution of the powers vested in him by the statute in such case made and provided, as an officer of the Thames conservators, duly appointed pursuant to such statute, whereby and by force of the said statute the said Thomas Shaw had forfeited the sum of 10*l.*

At the hearing by the justices in Petty Sessions at Rochford, in the said county of Essex, the justices dismissed the information.

By stat. 80 G. 2, c. 21, s. 5, it is enacted that, "For the better preservation of the" "fishery of the" "river of Thames, and waters of Medway, within the jurisdiction" of the mayor of the city of London, as conservator of the river of Thames and waters of Medway (sect. 1), "and for preventing, as much as may be, any abuses from being committed therein, it shall and may be lawful for the deputy of the said mayor for the time being, as conservator as aforesaid, commonly called the water bailiff, and his assistant and assistants, such assistant and assistants having been named and appointed to be his assistant and assistants, by warrant under the hand and seal of the mayor of the said city for the time being, and likewise for all and every other person or persons who shall for that purpose be specially authorized by any warrant or warrants under the hand and seal of the *590] said mayor, from time to time, and at all times, to *enter into any boat, vessel, or craft of any fisherman, or drudgerman, or other person or persons fishing or taking fish, or endeavouring to take fish, upon the said river of Thames, or upon the said waters of Medway, within the jurisdiction aforesaid, and there search for, take, and seize all spawn, fry, brood of fish," &c., "as shall then be in any such boat or boats, vessel or craft, in or upon the said river or waters; and to take and seize on the shore or shores adjoining to the said river, or waters of Medway, within the jurisdiction aforesaid, all such spawn, fry, brood of fish," &c., "as shall be there found."

By sect. 6 of the same statute it is enacted, "That if any person or persons shall obstruct or hinder the said water bailiff, his assistants, or any of the said officers, or any constable, headborough or other peace officer, in the execution of any of the powers vested in them by this Act, or of any warrant or warrants to be issued by the said mayor, recorder, or any alderman of the said city, or justice respectively, in pursuance of this Act;" "the person or persons so offending therein shall, for every such offence, forfeit the sum of 10*l*."

Sect. 11 authorizes the levy of penalties by distress; "but in case any such offender" "shall think himself" "aggrieved by such conviction, and shall within" "five days enter into a recognisance" "before such magistrate or magistrates, before whom he" "shall be so convicted (which said recognisance shall be returned, within the space of fourteen days, to the said Court of the mayor and aldermen), conditioned for his personal appearance at some Court of the said mayor and aldermen of the said city, to be holden within six weeks after the acknowledging such recognisance, or at the next Court of *591] Conservancy to be held for the county in which such *offence shall be committed, and to stand to and abide such order as shall be made in the premises by such Court," "the said Court of mayor and aldermen, or Court of Conservancy, is hereby empowered and directed upon a petition of appeal presented to them, by the party or parties so convicted, complaining of such conviction," "finally to hear and determine the matter of such appeal," "and the said Courts respectively" "are hereby empowered to order" "any" "penalties laid on or incurred by any of the parties complaining, to be mitigated, or to vacate or set aside such conviction," "or" "to ratify and confirm the same, and" "award such" "costs to be paid by the appellant as to them shall seem meet; And the said Court of mayor and aldermen,

or Court of Conservancy, may, on forfeiture of any such recognisance, estreat the same."

The Thames Conservancy Act, 1857, 20 & 21 Vict. c. cxlvii., (a) by sect. 50, vests "all the estate, right, title, and interest of the mayor and commonalty and citizens of the city of London," "and all the estate, right, title and interest" of Her Majesty "in the bed and soil and shores of the river Thames," within certain limits, in the conservators appointed under that Act; and by sect. 52 enacts that "From and after the commencement of this Act all the powers and authorities, rights, and privileges, which are now vested in or which may have been or may be exercised by Her Majesty in right of her Crown, and all the powers and authorities, rights and privileges, at any time heretofore given or granted to, or which are now vested in, or which have been or may be exercised by the mayor and [592] commonalty and citizens, or by the mayor and aldermen of the city of London, or by the common council, or by the mayor for the time being of the said city, by prescription, usage, charter, or Act of Parliament, or otherwise, with regard or relation to the conservancy and the preservation and regulation of the river Thames, and of the several rivers, streams, and watercourses within the flow and reflow of the tides of the said river, within the limits aforesaid, and upon the banks, shores, and wharfs of the said river and the port of London, shall be and the same are hereby vested in the conservators by this Act appointed, to be by them exercised in the same manner, and under and subject to the same restrictions, as the same are now respectively legally exercised by Her Majesty, or by the mayor and commonalty, and citizens, or by the said mayor and aldermen, or by the common council, or by the said mayor, save only and except so far as the same may be modified by or be inconsistent with the provisions herein contained."

Sect. 76 imposes a penalty, not exceeding 5*l.*, on any person who "shall resist or make forcible opposition against any person employed in the due execution of this Act, or shall assault any surveyor, engineer, or agent, or any collector of toll, in the due execution of his office."

Sect. 149 provides for the recovery of penalties before any justice, and sect. 161 gives an appeal to the Court of Quarter Sessions.

Previous to the coming into operation of the Thames Conservancy Act, 1857, the mayor, commonalty, and citizens of the city of London had and exercised by the lord mayor for the time being, during his mayoralty, "or by his sufficient deputies, the conservation of [593] the said river, between Staines, in the county of Middlesex, and Yantlett, otherwise Yantlet, in the county of Kent; and by-laws for the regulation of fishermen in the river Thames were made by the Court of the mayor and aldermen of the city of London, by virtue of stat. 30 G. 2, c. 21, s. 1.

At the hearing of the information, the charge was supported by the conservators of the river Thames, who appeared by counsel and attorney. On behalf of the appellant it was proved to the satisfaction of the justices that, on 11th January last, the appellant went on board the respondent's boat, then lying at Leigh aforesaid, within the limits

(a) Local and personal, public. "To provide for the conservation of the river Thames, and for the regulation, management, and improvement thereof."

of the jurisdiction of the conservators of the river Thames, to examine the shrimps caught by the respondent; that he stated the object of his visit, and produced his appointment; that he saw in the respondent's boat a quantity of small shrimps which he considered "brood;" that he endeavoured to seize them, and that thereupon the respondent assaulted him and prevented the seizure.

The appointment of the appellant, under the seal of the conservators of the river Thames, was as follows. "Know all men by these presents that we, the conservators of the river Thames, have named and appointed, and by these presents do name and appoint, Thomas Turnidge, of Leigh, in the county of Essex, to be assistant river-keeper during our pleasure; and we do hereby authorize the said Thomas Turnidge to enter any boat, vessel or craft, of any fisherman, dredgerman, or other person or persons fishing or taking fish, or endeavouring to take fish, upon the said river of Thames, within our *594] jurisdiction, and there to search for, take and *seize, all spawn, fry, brood of fish, spat of oysters, and unsizeable, unwholesome, or unseasonable fish, and also all unlawful nets, engines and instruments for taking or destroying fish, as shall then be in any such boat or boats, vessel or craft, in or upon the said river, and to take and seize, on the shore or shores adjoining to the said river, within the jurisdiction aforesaid, all such spawn, fry, brood of fish, spat of oysters, unsizeable, unwholesome, or unseasonable fish, and also all unlawful nets, engines or instruments for taking or destroying fish, as shall there be found; and, after taking or seizing such unlawful nets, engines or instruments, or any spawn, fry, brood of fish, spat of oysters, or unsizeable, unwholesome, or unseasonable fish, you, the said Thomas Turnidge, are to bring, or cause the same to be brought, before the mayor of the city of London for the time being, or the recorder of the said city, or one of the said aldermen of the said city, if seized within the limits of the said city of London and liberties thereof, either upon the said river, or on shore, or before the mayor of the said city, or the recorder of the said city, or one of the aldermen of the said city, or one of Her Majesty's justices of the peace of the county in which such seizure shall be made, if made upon the said river, out of the limits of the said city, or the liberties thereof, but within our jurisdiction as aforesaid, or before one of Her Majesty's justices of the peace of the county in which the same shall be seized on shore, in order that all such unlawful nets, engines, or instruments, as also all such spawn, fry, or unsizeable, unwholesome, or unseasonable fish, as shall be seized as aforesaid, may be forthwith burnt or destroyed, and the party from whom the same shall be taken punished according to law. And you are *595] *to receive no money, gratuity, or reward whatsoever, from any person, to prevent, delay, or hinder any prosecution; or compound, or wilfully conceal, any offence which shall be committed contrary to an Act of Parliament made and passed in the 30th year of the reign of His late Majesty King George the Second, intituled 'An Act for the more effectual preservation of the spawn and fry of fish, and for the better regulating the fishery thereof,' (a) which shall come to your knowledge; under pain to forfeit and lose 5*l*. for each

(a) Stat. 30 G. 2, c. 21.

time you shall be convicted of every such offence; and from time to time to apprise us thereof. Given under our seal this 7th day of December, 1859."

It was contended by the counsel for the appellant that by force of sects. 50 and 52 of The Thames Conservancy Act, 1857, the bed and soil of the river Thames, with the fishery and all the powers relating thereto, given to the mayor of London, and the protection extended to his officers by stat. 30 G. 2, c. 21, ss. 5, and 6, were transferred and extended to the conservators of the river Thames and their officers.

The justices doubted the correctness of this view, and dismissed the information: First, because it appeared to them that, assuming the powers of stat. 30 G. 2, c. 21, s. 5, to be transferred to the conservators, it must also be held that the jurisdiction on appeal, under sect. 11, is likewise vested in them, and the respondent, if convicted, would be without appeal, except to his prosecutors. If, to avoid this, the justices held that stat. 30 G. 2, c. 21, s. 11 (the appeal clause), was modified by sect. 161 of The Thames Conservancy Act, 1857, then they considered that they must also hold that stat. 30 G. 2, c. 21, *s. 6 (the penal clause), is modified by sect. 76 of The Thames Conservancy Act, 1857; and that the defendant would be liable [*596 to be sued only for the reduced penalty imposed by the latter section.

Secondly; because, although the bed and soil of the river Thames, which were in the Crown, are transferred to the conservators by the 50th section of The Thames Conservancy Act, the justices doubted whether the fishery, which was common to all (1 Mod. 105), was thereby transferred, and they also doubted whether the powers of stat. 30 G. 2, c. 21, an Act having exclusive reference to the fishery, were powers with regard or relation to the conservancy, preservation and regulation of the river Thames, and, as such, vested in the conservators by the 52d section of The Thames Conservancy Act, 1857; all the provisions of which appeared to them to have especial reference to the navigation of the river and the regulation of the port of London.

The questions of law for the opinion of the Court were: First, are the conservators of the river Thames authorized to appoint officers to exercise the powers given to the water bailiffs of the city of London by stat. 30 G. 2, c. 21, s. 5?

Secondly, are such officers entitled to the protection given by the 6th section of the same statute?

Thirdly, is the jurisdiction on appeal given to the mayor and aldermen by the 11th section of the same Act, now vested in the conservators of the river Thames?

Fourthly, is the 76th section of The Thames Conservancy Act applicable to the offence charged against the respondent; and is the penalty thereby imposed cumulative or substituted?

If the Court should be of opinion that the justices *were right in law in dismissing the said information, their determination [*597 was to be affirmed. But, if the Court should be of a contrary opinion, it was to be reversed.

Sir W. Atherton, Solicitor-General, for the appellant, (a) argued that, under the Thames Conservancy Act, 1857, the conservancy of the fishery, as well as of the navigation, of the Thames was transferred to the conservators of the river Thames, created by that Act. In

(a) In last Michaelmas Vacation, Wednesday, November 28th, 1860.

support of his argument, he referred to stat. 17 R. 2, c. 9, headed "Justices of peace shall be conservators of the statutes touching salmons"; 1 Eliz. c. 17, "An Act for preservation of spawn and fry of fish," by sect. 6 of which "The mayor of the city of London for the time being, and all and every other person and persons, bodies politic and corporate, which" "lawfully" had "or ought to have any conservation or preservation of any rivers, streams or water, or punishments and corrections of offences committed in any of them," were empowered to inquire into and determine all offences committed against the Act "within his or their" "jurisdiction and conservancy;" and 9 Ann. c. 26, "An Act for the better preservation and improvement of the fishery within the river of Thames, and for regulating and governing the Company of fishermen of the said river," which, also, by sect. 6, gave jurisdiction to determine complaints, to the lord mayor and aldermen of the city of London, or any one of them, "for all offences committed within the jurisdiction of the said lord mayor, as conservator of the said river of Thames;" as showing that the conservancy *of the river involved the power to protect the fishery. He also cited 4 Inst. 250, and the Privilegia Londini, tit. "Court of Conservancy for the river Thames," p. 398 (ed. 3); and argued that, upon the true construction of stat. 20 & 21 Vict. c. cxlvii. s. 52, the conservators of the Thames had authority to appoint the appellant assistant river-keeper, with all the powers before exercised, under stat. 30 G. 2 c. 21 s. 5, by assistants of the water-bailiff; and that the respondent was liable to conviction, either under stat. 30 G. 2, c. 21, s. 6, or under stat. 20 & 21 Vict. c. cxlvii. s. 76, for obstructing the appellant in the execution of his statutory duties.

No counsel appeared for the respondent.

Cur. adv. vult.

BLACKBURN, J., now delivered the judgment of the Court.(a)—In this case a question of considerable difficulty arises on the construction of the Thames Conservancy Act, 1857, 20 and 21 Vict. c. cxlvii; which, by sect. 52, transferred to a newly created corporation, called "The Conservators of the river Thames," amongst other things, all the powers and authorities, rights and privileges" which might be exercised by the Queen, in right of her Crown, or by the mayor and commonalty of the citizens of London, or by the mayor and aldermen, or by the mayor of London, "by prescription, usage, charter, or Act of Parliament, or otherwise, with regard or relation to the conservancy and the preservation and regulation of the river Thames," "to be by them exercised in the same manner, and under and subject *599] to the same *restrictions, as the same are now respectively legally exercised by Her Majesty, or by the mayor," &c., "save only and except so far as the same may be modified by or be inconsistent with the provisions" "contained" in that Act.

Amongst the powers of the city of London was that of holding the Court for the conservation of the water and river of Thames; and it is said, in 4 Inst. 250, that "The mayor of London for the time being hath the conservation and rule of the water and river of the Thames, &c., and authority as touching punishment for using unlawful nets and other unlawful engines in fishing, and to all correction and punishment there concerning unlawful nets and engines there." By stat.

(a) Wightman and Blackburn, J.

30 G. 2, c. 21, for the better protection of the fishery, it is, by sect. 5, enacted that it shall be lawful "for the deputy of the said mayor for the time being, as conservator as aforesaid, commonly called the water-bailiff," and his assistants appointed by warrant under the hand and seal of the mayor, to enter fishing boats, and seize brood of fish found there. Since the passing of the Thames Conservancy Act the appellant has been appointed assistant river-keeper, by warrant under the seal of the conservators of the Thames, and is, as far as they can empower him, authorized to exercise the powers conferred by stat. 30 G. 2, c. 21, s. 5, on the assistants of the deputy of the lord mayor as conservator. The first question asked us is, whether the new corporation were authorized to make such an appointment. There is certainly nothing in the provisions of the Thames Conservancy Act to show that the Legislature had their attention called to the fisheries; but there is nothing to be found restricting the very general language used in the 52d section; and it seems to us *that the powers given to the mayor [*600 of London to appoint persons as assistants in exercising the powers given to the water-bailiff, as deputy of the mayor as conservator, are powers relating to the conservancy of the Thames, and are consequently transferred to the conservators of the Thames.

The next question is one of much more difficulty. The 6th section of stat. 30 G. 2, c. 21, imposes a penalty of 10*l.* on any person obstructing the said water-bailiff or his assistants, in the execution of that Act, and by sect. 11 there is an appeal given to the Court of Conservancy. The respondent in the present case had forcibly resisted the appellant in the execution of his duty as an assistant river-keeper, appointed by the conservators of the Thames, but exercising the powers originally conferred by stat. 30 G. 2, on the water-bailiff and his assistants appointed by the mayor. He was summoned before the justices, who refused to impose on him the penalty of 10*l.* under sect. 6 of stat. 30 G. 2, c. 21; and we think the justices were right. The officer appointed by the conservators has, we think, all the powers and authorities, rights and privileges, of the former officer, appointed by the mayor as conservator, and any one obstructing him must take the consequences which, at common law, would follow from obstructing a person having authority. But it seems to us that the penalties beyond the common law, which were imposed on those who obstructed the former officers, cannot be extended, by mere implication, to those obstructing the new officers; it requires something to show that the Legislature intended so to extend them, and there are no words in The Thames Conservancy Act that have the slightest tendency to express such an *intention. If the Legislature had meant the penal [*601 clause to extend to the new officers, they would certainly have made some provision as to the appeal, which is now made inoperative. In fact, it seems very plain that the question as to what was to be done with regard to the fisheries was not present to the minds of those who framed the Act, who very naturally thought only of the commerce and navigation of the Thames.

But we think that the officer employed in exercising the powers originally conferred by stat. 30 G. 2, c. 21, but which he puts in execution only by virtue of The Thames Conservancy Act, is a person employed in the due execution of the latter Act, within the meaning

vol. 98), Williams, J., says, "Wherever the instrument is declared on the rule is fully established, since the passing of the Common Law Procedure Act, 1852, that the defendant is entitled to inspection in the nature of oyer, not only where the instrument declared on is a deed under seal, but also in the case of contracts not under seal." "It may now be considered as fully established in all the Courts that the right to inspect extends to any writing, whether under seal or not, which is relied on by the other side as the foundation of his claim or defence." Scott v. Walker, 2 E. & B. 555 (E. C. L. R. vol. 75), shows the limits within which a party is entitled to inspection of documents in the possession of the opposite party; namely, that such inspection may be granted for the purpose of obtaining any evidence necessary to support the original case of the party applying, or to meet that of the other side; but not for the purpose of obtaining information showing how the case of the other side will be supported. The *606] plaintiffs, here, do not show by their affidavit how the memorandum will support their own case, or meet that of the defendants. In Adams v. Lloyd, 3 H. & N. 351, the Court of Exchequer held that, if a party interrogated under sect. 51 of the Common Law Procedure Act, 1854, as to whether he has in his possession any deeds or writings relating to lands in dispute, answers on oath that he has, but that such deeds relate exclusively to his own title to the lands, and do not show any title in the opposite party, he cannot be compelled to state the contents of the deeds, or to describe them, his oath as to their effect being conclusive. Pollock, C. B., in giving judgment, said, (a) "The question is, whether the plaintiff is bound to produce his title deeds. To compel him to do so would introduce a new rule, which certainly was never intended by this Act of Parliament, and would render a title deed of no more importance than a bill of exchange or any other written document. I think that a man's title deed is still protected unless it tends to prove the case of the opposite party; if it does not, it is irrelevant. The recent changes in the law have made no alteration in that respect." And Watson, B.: (b) "The authorities are clear, that a person is not entitled in equity to a discovery of title deeds unless they contain evidence of his own title." Secondly, the plaintiffs fail to show any ground for asking the defendants for particulars of the alleged lien or mortgage. In order to entitle themselves to such particulars, the plaintiffs are bound to show that the mortgage-debt has been paid, and nothing remains due; but their affidavits do not even state that any part of the debt has been paid.

*607] *Manisty*, contra.—The plaintiffs are entitled to inspect the memorandum; if on no other ground, under the well-known rule stated by Williams, J., in Price v. Harrison, 8 C. B. N. S. 617, 634 (E. C. L. R. vol. 98), that where a plaintiff founds his declaration, or a defendant his plea, upon a document in writing, whether or not it be under seal, the opposite party has a right to see that document. [WIGHTMAN, J.—Your case is stronger than was that of the defendant in Price v. Harrison, who was allowed to inspect a number of his own letters written to the plaintiff, of which he had not kept copies. Here, the plaintiffs ask for inspection of a single document, and one in

(a) 3 H. & N. 364.

(b) 3 H. & N. 357.

which they probably have as great an interest as the defendants.] (He was then stopped.)

(COCKBURN, C. J., was absent.)

WIGHTMAN, J.—It appears to me that there is nothing in the decision in *Scott v. Walker*, 2 E. & B. 555 (E. C. L. R. vol. 75), to affect the present plaintiffs' right to the inspection for which they ask. No doubt, a plaintiff is not entitled to inspect a document which makes out the defendant's case solely; but here, there is only one document, and both plaintiffs and defendants have an interest in it. The holder of a document in which another person is interested may be deemed a trustee of it for that other, within the old rule that inspection is to be granted of documents in the possession of the opposite party as trustee for the party asking for the inspection. As to the particulars, also, of the defendants' lien or mortgage, I see no reason why the plaintiffs should not have them.

*CROMPTON, J.—I also think that this rule should be made absolute. First, as to the particulars for which the plaintiffs [*608 ask. According to the ordinary practice, they ought to be given; by analogy to the case of a plea of set-off, under which particulars must be given, in order to do away with the hardship on the plaintiff which would otherwise be caused by the generality of the plea. Next, as to the memorandum. I think that inspection of it ought to be granted to the plaintiffs, who, in one sense, may be said to be interested in it. I concur in what has been said, as to that, by my brother Wightman; and I am also disposed to agree in the dicta of Williams, J., in *Price v. Harrison*, 8 C. B. N. S. 617, 634 (E. C. L. R. vol. 98), with this qualification, that, although the document of which inspection is sought is relied upon in the pleadings of the party in whose possession it is, the inspection ought not to be granted if the Court sees that the application is made for an improper purpose. The distinction between documents under seal and not under seal has, of late, been done away with for many purposes, and I am satisfied that it cannot have been the intention of the Legislature, in abolishing oyer, to abrogate the general right of litigants to inspect documents set up against them in the pleadings of their opponents. Any abuse of that right is effectually prevented by the matter being left in the discretion of the Court.

HILL, J.—I am of the same opinion. I think that the interest which the plaintiffs have in the memorandum entitles them to the inspection which they seek; and that they are also entitled thereto, according to the rule laid down in *Price v. Harrison*. In making *this rule absolute, it does not seem to me that we are going [*609 counter to the principles upon which the Courts of equity act. In *Latimer v. Neate*, 4 Cl. & Fin. 570, Latimer claimed to be the lawful owner of goods and chattels in the visible user and enjoyment of the Duke of Marlborough, and Neate, a judgment-creditor of the Duke, filed a bill against him and Latimer, charging that bills of sale and assignments of the said goods and chattels had been executed by the Duke to Latimer without consideration, and that they were void as against Neate. Latimer, by his answer, admitted that the bills of sale and assignments were in his possession, but said that they were executed to him for full consideration, and that the Duke had only

the permissive, not the absolute, use of the goods; and Latimer, by his further answer, claimed to have an equitable lien on the goods for money advanced; and he set forth in a schedule abstracts of the bills of sale and assignments. It was held that Neate was entitled to inspection of the bills of sale and assignments, on the grounds, first, that these instruments were only a mortgage security; and, secondly, that Neate had a right to see if the abstracts corresponded with the originals, in order to ascertain what he would have to pay to Latimer in redeeming the mortgage. That case is very nearly in point, and authorizes us to make the order for inspection. As to the particulars, also, I think that the plaintiffs are entitled to the order. Now that a general mode of pleading is allowed, the Court will always assist a party who is embarrassed thereby.

Rule absolute.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

—

Milary Vacation,

XXIV. VICTORIA. 1861.

The Judges of the Court of Queen's Bench who sat in Banc in this Vacation were:—

WIGHTMAN, J.
CROMPTON, J.

HILL, J.
BLACKBURN, J.

MARPLES *v.* HARTLEY. *Feb. 6.*

Stat. 17 & 18 Vict. c. 36, s. 1, enacts that every bill of sale of personal chattels shall be filed "within twenty-one days after the making or giving of such bill of sale," "otherwise such bill of sale shall," "as against all sheriff's officers and other persons seizing any property or effects comprised in such bill of sale in the execution of any process of any Court of law or equity authorizing the seizure of the goods of the person by whom" "such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued, be null and void to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale, which at or after the time" "of executing such process," "and after the expiration of the said period of twenty-one days, shall be in the possession or apparent possession of the person making such bill of sale."

Held that, under this enactment, the assignee of goods assigned by a bill of sale has twenty-one days from the date of the bill of sale, within which he may either file the bill of sale or take the goods out of the apparent possession of the assignor. That therefore, the title of such assignee to the goods is not defeated by their seizure, while in the apparent possession of the assignor but before the twenty-one days have expired, under a *f. fa.* issued against the goods of the assignor by an execution-creditor.

This was an interpleader issue, to try the title to certain goods seized in execution, on 5th July, 1860, *by the sheriff of Derbyshire, under a writ of *f. fa.* dated 3d July, 1860. [*611

At the trial, before Erle, C. J., at the Derbyshire Summer Assizes, 1860, it appeared that the writ of *f. fa.* was issued on a judgment obtained by the present defendant against one Shemwell, and that the goods, when seized under the writ, were in the possession of Shemwell. On 27th June 1860, Shemwell made a bill of sale of his goods

to the plaintiff; in which the goods seized under the fi. fa. on 5th July were included. At the time of that seizure the bill of sale had not been enrolled; and it was contended for the defendant that, on that account, the plaintiff could not recover. Erle, C. J., however, held that the plaintiff was not precluded, under stat. 17 & 18 Vict. c. 36, s. 1, from recovering by reason of his not having enrolled the bill of sale before the seizure of the goods. The plaintiff accordingly had a verdict: and leave was reserved to the defendant to move to set it aside, and to enter a verdict for the defendant instead thereof.

Field had obtained a rule to that effect.

Hayes, Serjt., now showed cause.—The goods, when seized by the sheriff, were the property of the plaintiff. Stat. 17 & 18 Vict. c. 36, s. 1, enacts that every bill of sale of personal chattels shall be filed “within twenty-one days after the making or giving of such bill of sale,” “otherwise such bill of sale shall,” “as against all sheriff’s officers and other persons seizing any property or effects comprised in such bill of sale in the execution of any process of any Court of law *612] or equity authorizing the seizure of the goods of the person by whom or of whose goods such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued, be null and void to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale, which at or after the time” “of executing such process,” “and after the expiration of the said period of twenty-one days, shall be in the possession or apparent possession of the person making such bill of sale.” This section gives the person to whom a bill of sale is made twenty-one days from its date in which to file it; and if, as in the present case, process issues and is executed against the goods of the assignor within those twenty-one days, the bill of sale is not thereby made null and void. The true construction of the section is, that it gives an execution-creditor a better title to goods left in the possession of the execution-debtor, than a person claiming them under a bill of sale from the debtor, if twenty-one days have elapsed from the date of the bill of sale, and if, notwithstanding, the bill has not been filed: but that it does not require the bill to be filed before the last of the twenty-one days. [*HILL, J.*—The statute makes the bill of sale, if not filed, null and void, so far as regards the property in or right to the possession of goods which, at or after the time of executing process against the goods of the assignor, are in his apparent possession. And, by sect. 7, the goods are to be deemed in the “apparent possession” of the assignor, “so long as they shall remain or be in or upon any house,” “land, or other premises occupied by him,” “notwithstanding that *613] formal possession” of them “may have been taken by or given to any other person.”] That definition of “apparent possession” does not apply to goods remaining on the premises of the assignor after they have been taken in execution. But, assuming that it does, the statute evidently contemplates an apparent possession continuing beyond the twenty-one days.

Field was then called upon to support the rule.

Field, in support of the rule.—The statute requires that the bill of sale should have been filed before the goods are actually seized under

process against the assignor; whether or not the seizure takes place within the twenty-one days. [HILL, J.—Are you not bound to show that the apparent possession by the assignor continued beyond the twenty-one days? WIGHTMAN, J.—If the time allowed by the Act for filing the bill of sale has not elapsed before the goods are taken in execution, how has the assignee, at the time of the seizure, failed to comply with the requirements of the Act?]

COCKBURN, C. J.—This is a very clear case. The statute requires that, in order that a bill of sale of goods may be null and void as against the assignee, the assignor shall be left in apparent possession of the goods for twenty-one days after the bill of sale is given, and that the bill of sale shall not have been filed within that period. The assignee has, therefore, twenty-one days from the date of the bill of sale, within which either to take the goods out of the assignor's possession, or to perfect his own title to them by filing the bill of sale. During the "twenty-one days the assignee has at all [*614 events a temporary title to the goods of which he cannot be deprived by their seizure by the sheriff.

WIGHTMAN, J., and HILL, J., concurred.

Rule discharged.

ANDERSON v. The MIDLAND Railway Company. Feb. 6.

Stat. 11 G. 2, c. 19, s. 1, enacts that "In case any tenant" "for life or lives, term of years, at will, sufferance, or otherwise, of any messuages, lands, tenements, or hereditaments, upon the demise or holding whereof any rent is or shall be reserved, due, or made payable, shall fraudulently or clandestinely convey away" "from such premises, his" "goods or chattels, to prevent the landlord" "from distraining the same for arrears of rent so reserved, due, or made payable," the landlord may, within thirty days next after such fraudulent removal, follow and seize the goods as a distress for the arrears of rent due.

A., in May, 1859, entered into an agreement, not under seal, with M., by which M. agreed forthwith to grant A. a valid lease under seal of a house and premises, for three years from 25th May, 1859, at the yearly rent of 8*4*l., payable quarterly. The agreement specified the lessor's and lessee's covenants to be contained in the lease; and it concluded as follows: "It is hereby mutually agreed that these presents shall operate as an agreement only; and that, until a lease shall be executed, the rent, covenants and agreements agreed to be therein reserved and contained shall be paid and observed, and the several rights and remedies shall be enforced, in the same manner as if the same had been actually executed." No lease was drawn up, but A. entered into possession, and remained till a quarter's rent became due, when he fraudulently removed his goods from the premises, to prevent their being distrained.

Held that the agreement, coupled with A.'s entry into possession, made A. tenant at will to M. at a fixed reserved rent, for which M. had a right to distrain; and that, therefore, M. was entitled, under stat. 11 G. 2, c. 19, s. 1, to follow and seize A.'s goods.

THE first count of the declaration alleged that defendants were common carriers, for hire, of goods and chattels, from a certain station, at Defford, in the county of Gloucester, to Bristol; and that, on 24th September, 1859, plaintiff caused to be delivered to them, as such carriers, certain goods and chattels, to be taken care of and carried by them from the said station at Defford to Bristol. Breach, that defendants did not carry the said "goods to Bristol; and that, by [*615 defendant's negligence, the said goods were wholly lost to plaintiff.

Second count. For that the goods were so delivered to defendants,

to be carried to Bristol, as in the first count mentioned; and that defendants promised plaintiff to carry them safely to Bristol and deliver them to plaintiff there, within a reasonable time. Breach, that defendants would not, within such reasonable time, carry the said goods to Bristol, or deliver them there to plaintiff, and that the said goods were wholly lost to plaintiff.

Third count. Trover for the goods.

Pleas. 1. To first count, except to so much of the breach as charges negligence and carelessness: That, before the delivery of the said goods to defendants, plaintiff, then being a tenant for a term of years of a messuage and hereditaments, upon the demise of which rent was reserved, fraudulently and clandestinely did convey from such messuage and hereditaments the said goods and chattels in the said first count mentioned, the same then being his goods and chattels, to prevent one Marsden, the landlord, from distraining the same for certain arrears of the said rent then due and payable; and brought the same to the said station, and then, as in the said first count mentioned, caused the same to be delivered to the defendants at the said station. Averments: That, within the space of thirty days next ensuing the said carrying away of the said goods and chattels, and before the committing of the breach herein pleaded to, or any part thereof, the said Marsden, being such landlord as aforesaid, took and seized the said goods and chattels, then found at the said station, as a distress for the *616] said arrears of the said rent, as the said Marsden "lawfully might, according to the statute in such case made and provided; and that defendants, by their servants, suffered the said seizure to be made, and afterwards, at the request of the said Marsden, the said arrears still continuing due, kept the same impounded as such distress, at the said station, for the said Marsden, until the said Marsden, while the said arrears were still due, took the same as such distress out of the possession of defendants with their consent, and sold the same under the said distress; whereby the same were lost to the plaintiff, and the defendants were prevented from carrying the said goods, and committed the breach herein pleaded to. Issue thereon. 2. A similar plea to the second count. Issue thereon.

At the trial, before Hill, J., at the Worcestershire Summer Assizes, 1860, it appeared that the plaintiff, in the month of April, 1859, had entered into a negotiation with a Mrs. Marsden, for the hiring of a house and premises at Kempsey, in Worcestershire, of which she was the owner. In May, 1859, an agreement was entered into between Mrs. Marsden and the plaintiff, which, so far as it is material, was as follows:—"An agreement," "whereby the said H. Marsden agrees to and with the said G. Anderson," "that the said H. Marsden" "will, by indenture to be forthwith prepared, and to be duly executed by the said parties hereto, grant unto the said G. Anderson" "a valid lease in law of all that dwelling-house and premises," &c., "to hold the same unto the said G. Anderson, for the term of three years from 25th May instant, at the yearly rent of 84l., payable by four equal quarterly instalments, on," &c. "And it is hereby mutually agreed that in such lease shall be contained covenants on the lessee's part as *617] follows." "(The covenants were here set out.) "And the said G. Anderson doth hereby" "agree with the said H. Marsden"

"that the said G. Anderson will accept such lease on the terms and conditions aforesaid, and pay one moiety of the charges thereof." "And the said H. Marsden" "agrees with the said G. Anderson" "that in such lease shall be contained a covenant for quiet enjoyment by the said G. Anderson during the said term. And it is hereby mutually agreed that these presents shall operate as an agreement only; and that, until a lease shall be executed, the rent, covenants and agreements agreed to be therein reserved and contained shall be paid and observed, and the several rights and remedies shall be enforced, in the same manner as if the same had been actually executed."

The plaintiff was then let into possession of the house and premises, and continued to reside there till after the first quarter's rent became due according to the terms of the agreement. Application was made for the amount due, but he refused to pay, alleging that certain repairs had not been completed according to Mrs. Marsden's promise. On 23d September, 1859, he removed all the effects which he had in the house to the Defford Station, on the defendants' railway, where they were soon afterwards seized by Mrs. Marsden, to whom the defendants gave them up. It was clearly made out that the goods had been fraudulently and clandestinely removed by the plaintiff; and the jury, under the direction of the learned Judge, returned a verdict for the defendants, leave being reserved to the plaintiff to move to enter the verdict for him.

Pigott, Serjt., had obtained a rule, calling upon the *defendants to show cause why the verdict should not be set aside, and [*618 a verdict, with 75*l.* damages, entered for the plaintiff instead thereof, on the grounds that the agreement between the plaintiff and Marsden was not a demise; that there was no right to distrain; and that there was no right in the landlord to take the goods as a distress for rent.

Phipson now showed cause.—The other side will say that the agreement between the plaintiff and Mrs. Marsden did not amount to a demise; and that, inasmuch as the plaintiff's occupation of the house under it was not as tenant under a demise whereby rent was reserved, due, or made payable, within the meaning of stat. 11 G. 2, c. 19, s. 1, Mrs. Marsden had no right, under that statute, to follow and distrain the plaintiff's goods. That statute enacts that "In case any tenant or tenants, lessee or lessees for life or lives, term of years, at will, sufferance or otherwise, of any messuages, lands, tenements, or hereditaments, upon the demise or holding whereof any rent is or shall be reserved, due, or made payable, shall fraudulently or clandestinely convey away, or carry off or from such premises, his, her, or their goods or chattels, to prevent the landlord or lessor, landlords or lessors, from distraining the same for arrears of rent so reserved, due, or made payable;" the landlord or landlords may, within thirty days next ensuing such conveying away or carrying off such goods and chattels, take and seize them, wherever they shall be found, as a distress for the said arrears of rent. Now, whatever was the effect of the agreement, it is clear that the plaintiff, by going into occupation of the house in pursuance of it, became a tenant to Mrs. Marsden, within *the very general language of the statute. And even [*619 if the reference, in the agreement, to a future lease to be drawn

up, prevents the agreement from being a demise, strictly speaking, at all events it created a "holding" at a fixed rent, within the meaning of the statute. The agreement did, however, create a demise sufficient to satisfy the Act. It shows an apparent intention, on the face of it, that Mrs. Marsden should give, and the plaintiff should take, possession of the house, at a fixed yearly rent; and it expressly provides that the rent shall be paid, and all the other stipulations observed, before the contemplated lease is executed, in the same manner as if that lease had been drawn up at once. It therefore amounted to a present demise, at a rent certain, and, being acted upon by the plaintiff's entry into possession, created the status of landlord and tenant between the parties, which is all that the statute requires. In *Pinero v. Judson*, 6 Bing. 206 (E. C. L. R. vol. 19), an agreement precisely similar in effect to the present was held to amount to an actual demise. (He was then stopped.)

Dowdewell, in support of the rule.—*Pinero v. Judson* was decided before the passing of stat. 8 & 9 Vict. c. 106, by sect. 3 of which "A lease, required by law to be in writing, of any tenements or hereditaments," "made after" "1st October, 1845, shall" "be void at law, unless made by deed." The present agreement, either as a lease for a term of more than three years from the making thereof, or as the grant of an uncertain interest in lands, was required by the Statute of Frauds to be in writing, and is therefore, not being under seal, void at law. [*620] [WIGHTMAN, J.—Do you say that the plaintiff was a trespasser in going into occupation of the house?] It may be admitted that he became tenant at will, but not at a fixed rent. [COCKBURN, C. J.—He agreed to pay a certain rent, and that the respective rights and remedies of the landlord and himself should be enforceable just as though a lease had been executed.] That would not turn the executory demise contemplated by the agreement into an actual present demise. Although an intended lessee who enters into possession under a mere agreement for a lease, not amounting to an actual demise, becomes thereby tenant at will, an actual tenancy at an agreed rent, recoverable by distress, is not created until he pays part of the agreed rent, or does something equivalent: *Hegan v. Johnson*, 2 Taunt. 147, *Duak v. Hunter*, 5 B. & Ald. 322 (E. C. L. R. vol. 7). [HILL, J.—Those cases proceeded on the ground that the parties to the agreements had left it doubtful when the tenancy was to commence, or the rent to become due. But in the present case, as in *Pinero v. Judson*, the agreement makes positive provision for the commencement of the tenancy and the rent, and the amount of the latter.]

COCKBURN, C. J.—I am of opinion that this rule must be discharged. In order to ascertain the intention of the parties, we must look at the whole instrument; and we must see what has been done under it. The agreement before us contemplated two things: one, that a lease, containing certain specified covenants and conditions, should thereafter be executed; the other, that, in the mean time, the tenant should be let into possession, and enjoy the premises [*621] upon the same terms as those to be contained in that lease. The question arises, upon this, whether such an arrangement creates an immediate tenancy, and, if so, such a tenancy as to give the land-

lord a right of distress. I have no doubt that an immediate tenancy at will was created, either by the terms of the agreement, or else under sect. 1 of The Statute of Frauds,^(a) assuming Mr. Dowdeswell's argument that the agreement was void at law by reason of stat. 8 & 9 Vict. c. 106, as not being under seal, to be well founded. The tenancy thus created was, by the words of the agreement, at a fixed and ascertained rent, commencing at an ascertained date: and, that being so, it follows that the landlord had a right to distrain. The cases which Mr. Dowdeswell has cited are distinguishable, on the ground that the agreements for leases, there in question, unlike the present agreement, made no provision for the status of the parties to them during the interval before the leases were executed.

WIGHTMAN, J.—I am of the same opinion. Stat. 11 G. 2, c. 19, s. 1, gives the landlord the right to follow and seize goods fraudulently and clandestinely removed by a tenant to prevent their being distrained for rent, in all cases where the tenant has become such by a demise or holding upon which any rent is reserved, due, or made payable. Here, the parties agreed that the tenant should ^{[*622} have a formal lease under seal, but that he should in the mean time hold upon the same terms that were to be contained in the lease: and, consequently, that he should pay the fixed rent which was to be reserved by the lease. The plaintiff was, therefore, tenant at a fixed rent to Mrs. Marsden, and she was entitled to avail herself of the provisions of the statute. I agree with the Lord Chief Justice as to the distinction which exists between the present case and those cited by Mr. Dowdeswell.

HILL, J.—I also think that this rule should be discharged. The agreement was primarily framed with a view to a lease for three years, to be afterwards drawn up. But the parties stipulate, further, that until that lease is granted its terms shall be binding on both of them. Thereupon, the plaintiff entered into occupation of the premises. Now, when a party to an agreement for a lease enters into possession before the lease is executed, he becomes in the first instance a tenant at will, and the other party has no right to distrain until either the tenant has paid rent, or the precise amount of the rent which he is to pay has been agreed upon. Littledale, J., says, in *Hamerton v. Stead*, 3 B. & C. 478, 483 (E. C. L. R. vol. 9), "Where parties enter under a mere agreement for a future lease they are tenants at will; and if rent is paid under the agreement, they become tenants from year to year, determinable on the execution of the lease contracted for, that being the primary contract. But if no rent is paid, still before the execution of a lease the relation of landlord and tenant exists, the parties having entered *with a view to a lease and not a purchase." [*623 And *Saunders v. Musgrave*, 6 B. & C. 524 (E. C. L. R. vol. 13), shows that an agreement that a fixed rent shall be paid has the same effect, in giving the landlord a right to distrain, as actual payment of rent.

Rule discharged.

(a) Stat. 29 Car. 2, c. 3, enacting, by sect. 1, "That" "all leases," "or terms of years, or any uncertain interest of, in, to or out of any messuages," "lands, tenements or hereditaments, made and created" "by parol, and not put in writing and signed by the parties," "shall have the force and effect of leases or estates at will only."

SINDEN and Others v. BANKS. Feb. 6, 8.

The Friendly Societies Act, 10 G. 4, c. 56, enacts by sect. 27, "that provision shall be made by one or more of the rules of every such society," "specifying whether a reference of every matter in dispute between any such society, or any person acting under them, and any individual member thereof, or person claiming on account of any member, shall be made to" "justices of the peace" "or to arbitrators." The subsequent Act, 18 & 19 Vict. c. 63, which by sect. 1, repeals the former, "save and except as to any offences committed, or penalties or liabilities incurred, or bond or security given, or proceedings taken under the same, before the commencement of" the repealing Act, by sect. 40 enacts, that "every dispute between any member or members of any society established under this Act or any of the Acts hereby repealed, or any person claiming through or under a member, or under the rules of such society, and the trustee, treasurer, or other officer, or the committee thereof, shall be decided in manner directed by the rules of such society, and the decision so made shall be binding and conclusive on all parties, without appeal."

The rules of a friendly society formed under stat. 10 G. 4, c. 56, provided that if any dispute should arise as to the legality or payment of any fine, money, or allowance, or as to the disqualification of any member at the time of his admission, or between any officer and member, it should be referred to the decision of the committee of the society, from whom there should be an appeal to justices.

Before July, 1855, when stat. 18 & 19 Vict. c. 63, came into operation, defendant, the treasurer of this society, received, as such, certain moneys, the balance of which he failed to pay over to plaintiffs, the society's trustees, and to recover which plaintiffs after that date brought this action.

Held that, whether the case was governed by stat. 10 G. 4, c. 56, or by stat. 18 & 19 Vict. c. 63, the action lay: for that the plaintiffs' claim was not a dispute between the society and the defendant in his capacity as an individual member of it, which disputes alone were required by either statute to be dealt with under the society's rules, and otherwise than by action.

Held, by Hill, J., that stat. 18 & 19 Vict. c. 63, governed the case.

DECLARATION, containing common money counts, by trustees of a friendly society, being a society entitled to enjoy all the exemptions and privileges conferred on friendly societies by stat. 18 & 19 Vict. c. 63, *entitled "An Act to consolidate and amend the law relating to friendly societies."

Plea. That, before and at the time of the commencement of this suit, the claim now made in the declaration was made by plaintiffs, as such trustees as aforesaid, on defendant as a member of the said society, and was a matter in dispute between defendant as such member and plaintiffs as such trustees as aforesaid, which was, at the said times aforesaid and is by the rules of the said society directed to be decided otherwise than by action at law, to wit, by justices of the peace. That the said society was, at the time of the passing of the said statute in the declaration mentioned, a subsisting society, which had been theretofore formed and established under the Acts thereby repealed, and the rules of which had been and were confirmed, registered and certified under the said repealed Acts, before the passing of the statute in the declaration mentioned; and which said rules of the said society were in force before and at the times of the existence of the said dispute and claims, and at the commencement of this suit, and still are in force and binding upon plaintiffs as such trustees as aforesaid, and on defendant as such member of the said society as aforesaid, by virtue of the statute in such case made and provided.

Replication. That the claim in the declaration mentioned accrued after the passing and coming into operation of stat. 18 & 19 Vict. c. 63, entitled "An Act to consolidate and amend the law relating to friendly societies." That the said society, before and at the time

when the said claim accrued, was a society established to enjoy and enjoying all the privileges and exemptions by the said Act conferred on societies to be established *thereunder; and that the sections [625 of the said Act in the 11th section thereof specially enumerated extended and were applicable to the said society, and the said claim was and is a claim against defendant as treasurer of the said society, for a balance appearing to be due from him upon the account last rendered by him as and whilst he was such treasurer, and for money since then received by him on account of the said society whilst he was, and as, such treasurer thereof, and not otherwise. General averment of performance of all conditions precedent.

Rejoinder. That the said account rendered by defendant as such treasurer as aforesaid was not rendered or audited after the passing or coming into operation of the said Act to consolidate and amend the law relating to friendly societies, in the replication mentioned. Issue thereon.

At the trial, before Blackburn, J., at the Sussex Summer Assizes, 1860, it appeared that the defendant had been for many years treasurer of the friendly society of which the plaintiffs were the trustees; which was formed under stat. 10 G. 4, c. 56, and the rules of which, so far as they are material, will be found referred to in the argument.

The defendant resigned his office in April, 1856. The present action was commenced to recover from him the sum of 30*l*., the balance of moneys received by him as treasurer. This sum was received by him in May, 1858. The trustees failing to procure payment of this amount by the defendant, his name was struck out of the books of the society, and remained so until 17th November, 1859, when he complained to justices, who ordered him to be reinstated. Proceedings were then taken against him in the County Court, *but the plaint was subsequently removed by certiorari into [626 this Court. The jury returned a verdict for the plaintiffs, and the learned Judge gave the defendant leave to move to set it aside and enter a verdict for him instead.

J. Brown had obtained a rule to that effect.

Denman now showed cause.—There is nothing in either of the Acts relating to friendly societies to debar the plaintiffs from maintaining this action. The last Act is stat. 21 & 22 Vict. c. 101, sect. 5 of which repeals the proviso in stat. 18 & 19 Vict. c. 63, s. 40, but does not affect the question, which depends upon the first clause in that section; whereby it is enacted that "Every dispute between any member or members of any society established under this Act or any of the Acts hereby repealed, or any person claiming through or under a member, or under the rules of such society, and the trustee, treasurer, or other officer, or the committee thereof, shall be decided in manner directed by the rules of such society, and the decision so made shall be binding and conclusive on all parties, without appeal." In the present case the rules of the society direct that disputes between the society and its members are to be decided by the committee of the society, with an appeal from them to justices. The plaintiff's claim, however, is not such a dispute; the rule and enactment applying only to disputes between members of the society, as such, during their membership, and the trustees or officers of the society. Here,

the claim made upon the defendant by the plaintiffs was not made upon him as a member of the society; and was, moreover, made after *627] he had ceased to be a member. Nor does the case fall within the provisions of sect. 24, which enacts that an officer of the society guilty of fraud in withholding moneys may be brought before justices and made to repay them: for no imputation of fraud was made upon the defendant at the trial. Sect. 1 repeals stat. 10 G. 4, c. 56, under which this society was formed; but with a saving of any offences committed, or penalties or liabilities incurred, under that Act, before the commencement of stat. 18 & 19 Vict. c. 63; i. e., before 23d July, 1855. Sect. 2 enacts that, notwithstanding such repeal, "every friendly society now subsisting, which heretofore had been formed and established under the" former Act, "shall still be deemed to be and shall continue to be a subsisting society, as fully as if this Act had not been made:" whilst, by sect. 3, the rules of such societies are to continue in force until altered or rescinded. The rules of the present society, here material, are the 29th and the 32d. The 29th provides that "If any dispute shall arise as to the legality or payment of any fine, money, or allowance, or as to the disqualification of any member at the time of his admission, or between any officer and member," the matter shall be referred to the decision of the committee of the society, from whom there may be an appeal to justices. By rule 32, "The treasurer, trustees, or any other officer of the society, shall not be liable to make good any deficiency which may arise in the funds of the society, unless such persons shall have declared by writing under their hands, deposited and registered in like manner with the rules of the society, that they are willing so to be answerable:"—"provided that the trustees, treasurer, and every other officer of the society shall *628] be personally responsible and liable for *all moneys actually received by them on account of or to and for the use of the society." This rule is almost verbatim the same with stat. 10 G. 4, c. 56, s. 22. The defendant is therefore personally liable for the balance remaining in his hands as treasurer of the society. And he is liable to be sued for it, inasmuch as rule 29 does not apply to the case, which is therefore not within the arbitration clause, sect. 27, of stat. 10 G. 4, c. 56, enacting, "That provision shall be made by one or more of the rules of every such society" "specifying whether a reference of every matter in dispute between any such society, or any person acting under them, and any individual member thereof, or person claiming on account of any member, shall be made to" "justices of the peace" "for the county in which such society may be formed, or to arbitrators." The authorities show that such a clause takes away the right of action, and makes an arbitration imperative, only in cases of dispute between a society and some member of it, as such: *Crisp v. Bunbury*, 8 Bing. 394 (E. C. L. R. vol. 21); *Morrison v. Glover*, 4 Exch. 430; *Doe d. Morrison v. Glover*, 15 Q. B. 103 (E. C. L. R. vol. 69); *Cutbill v. Kingdom*, 1 Exch. 494; *Reeves v. White*, 17 Q. B. 995 (E. C. L. R. vol. 79). [HILL, J.—It seems to me that there can be no right of action against the treasurer whilst rightfully holding: but that as soon as he, by his own wrongful act, terminates his rightful holding, an action will lie.] Yes: and the

action is not against him as a member of the society; but, even if it is, he is liable to it by reason of rule 82 and of stat. 10 G. 4, c. 56, s. 22. [HILL, J.—Sect. 27 certainly appears to be restricted to disputes between a society and its members as such.]

**J. Brown and Archibald, contra.*—The case is governed by stat. 10 G. 4, c. 56, by reason of stat. 18 & 19 Vict. c. 68, s. 1, inasmuch [*629 as the present claim was a subsisting claim at the time that the later Act passed. Whether, however, the case is governed by stat. 10 G. 4, c. 56, s. 27, or stat. 18 & 19 Vict. c. 68, s. 40, is really immaterial: for there is no substantial difference between the two enactments. In either view, the plaintiffs' claim is one which the Legislature has directed to be submitted to arbitration instead of being made the ground of an action. The dispute is one between the society and the defendant as a member. By rule 81 the treasurer is required to be a member; and rules 26 and 35 show that his duties do not cease with his retirement from office, it being his duty to pay over the balance then remaining in his hands. That duty is imposed upon him as a member of the society; and a dispute relating to his liability to pay over the balance is a dispute between the society and him as a member. The society might have taken proceedings before justices under stat. 18 & 19 Vict. c. 68, s. 24, if they could have made out a case of fraud against the defendant; but, failing that, their only remedy was by arbitration. Stat. 10 G. 4, c. 56, s. 22, which enacts that the treasurer of a society shall be personally responsible and liable for all moneys actually received by him, does not provide that he shall be liable to an action or responsible in any other manner than is pointed out elsewhere in that Act. Stat. 18 & 19 Vict. c. 68, s. 22, which enacts that if the treasurer fails within seven days after a formal requisition to render a true account of all moneys received and of the balance in hand, and to hand over such balance, he may be sued by the trustees of the *society, tends strongly to show that under [*630 no other circumstances can he be so sued. The cases cited on the other side do not affect the present question. [HILL, J.—A dispute between a society and its treasurer as to moneys received by him stands on a very different footing from a dispute between the society and an ordinary member as such. The Legislature may well have intended to guard individual members against expensive litigation; and yet not to take away the remedy by action against a treasurer withholding the common funds. I observe that stat. 18 & 19 Vict. c. 68, s. 22, provides that, in the action against the treasurer there sanctioned, the trustees are to be entitled to recover their full costs of suit as between attorney and client.]

(COCKBURN, C. J., and WIGHTMAN, J., were absent.)

CROMPTON, J.—I am of opinion that this rule must be discharged. The question really turns upon the construction of the two enactments which have been chiefly referred to; stats. 10 G. 4, c. 56, s. 27, and 18 & 19 Vict. c. 68, s. 40. Decided cases must be taken to have established that, if a statute relating to such a society as the present enacts that disputes between the society and its members shall be determined in the manner directed by the rules of the society, and if those rules direct such disputes to be referred to arbitration, the

remedy by action in respect to such disputes is taken away. The question therefore is, whether the present dispute is one within the meaning of either of the statutes before mentioned. Now stat. 10 G. 4, c. 56, s. 27, speaks of disputes between "any *such society, *631] or any person acting under them, and any individual member thereof, or person claiming on account of any member." These words appear to draw a distinction between the society and its officers on the one hand, and its individual members on the other. I think that we should be straining their meaning if we held that the description "individual member" and "member" includes the treasurer. The Act contains very strong provisions directed at frauds by officers of a society, the treasurer amongst others; and I think that the remedies against such officers thereby given were intended to be cumulative, and to afford more prompt redress in cases of fraud than could be obtained by an action; not that they were to be substituted for the common law remedy by action; certainly not, at all events, in a case where no fraud is imputed to the defendant. Sect. 25 empowers justices to fine or imprison both officers and members of a society guilty of certain specified frauds; clearly showing that sect. 27 does not exhaustively provide for all cases of dispute between the society and its members. Sect. 25 also contains a proviso that nothing therein contained shall prevent the society from proceeding by indictment or complaint against the party complained of; and does not, in my opinion, debar the society from a cumulative remedy by action at common law also. Sect. 22 renders the treasurer personally liable and responsible for all moneys which he has actually received, and contains no limitation of his responsibility at common law. Similar remarks apply to stat. 18 & 19 Vict. c. 68, s. 40, the language of which, if anything, still more clearly than that of the previous Act, refers only to disputes between the society and its members as such, and as *632] distinct from *the society's officers. [The learned Judge read the section.] Sect. 24 is analogous to sect. 25 of the earlier Act, and sect. 20 to sect. 22 of the earlier Act. Mr. Archibald has relied upon sect. 22 of the later Act as specifying the only case in which an action will lie against the treasurer; but I cannot see that that section takes away the right to sue the treasurer in any other state of things. It lays down the mode of proceeding where the society wish to obtain an account from the treasurer; but when, as here, no account is wanted, and it is clear that the treasurer has an ascertained amount in hand which he will not pay over, there is no reason why the remedy by action may not also be pursued against him. I am therefore of opinion that the defendant is liable to this action.

HILL, J.—I am of the same opinion. The first question which arises is, whether we are to decide the case under stat. 10 G. 4, c. 56, or under stat. 18 & 19 Vict. c. 68. The latter statute passed in July, 1855, and by sect. 1 repealed the former, "save and except as to any offences committed, or penalties or liabilities incurred, or bond or security given, or proceedings taken, under the same, before the commencement of" that "Act." It is now suggested that, inasmuch as the present claim was subsisting at the time the later Act passed, it is saved from the operation of that Act. But I think that "liabilities," in stat. 18 & 19 Vict. c. 68, s. 1, must be read in conjunction with

"under the same;" and that the defendant's liability did not arise under stat. 10 G. 4, c. 56. We must therefore look to stat. 18 & 19 Vict. c. 63, as governing the case; though after all the distinction between the two Acts, which are in *pari materia*, *is very [*633 slight. I am of opinion that this dispute does not fall within the purview either of stat. 10 G. 4, c. 56, s. 27, or of stat. 18 & 19 Vict. c. 63, s. 40. The main object of both statutes is to protect the property and the interests of the members of these societies by preventing the expenditure of their funds in needless and expensive litigation; to provide a cheap and summary tribunal for the settlement of disputes between the members; and to extend the remedies before existing against those who wrongfully keep possession of the common property; even so far as to enable the societies to reach moneys in the hands of their officers who become bankrupt or insolvent. I think that we should strain the language of the Legislature far beyond its natural meaning, if we held that the claim of a society upon its treasurer for misappropriating and keeping in his hands the moneys of the society, is a dispute between the society and one of its members, within the meaning of either enactment. I think, moreover, that the statutes evince an intention to give cumulative remedies against a treasurer, and not to prevent the society from availing itself of the common law remedy by action against him. For these reasons and for those which have been given by my Brother Crompton, I think that the plaintiffs are entitled to our judgment, and that the rule must be discharged.

Rule discharged.

*The QUEEN v. BRADLEY. Feb. 11.

[*634

Stat. 7 W. 4 & 1 Vict. c. 78, s. 14, enacts that aldermen shall be elected in boroughs by the personal delivery to the mayor or chairman, at the meeting for the election, by each councillor entitled to vote, of a voting paper containing, *inter alia*, the Christian name and surname of the persons for whom he votes.

Held, that the statute is satisfied if the voting paper contains a contraction of a Christian name which is well known and in ordinary use as representing that name: and that, in such a case, the name need not be written in full. That, therefore, the contractions "Wm." and "Willm." may be used in a voting paper as equivalent to "William."

INFORMATION in the nature of a *quo warranto*, stating that the borough of Sheffield, in the county of York, was a borough duly incorporated by royal charter. That within the said borough, pursuant to the said charter, there hath been, and still of right ought to be, one mayor, divers, to wit fourteen, aldermen, and divers, to wit forty-two, councillors to be elected in the manner in the said charter specified. That William Bradley, of the borough aforesaid, brewer, on the 9th November last past, at the borough aforesaid, did use and exercise, and from thence continually afterwards to the time of exhibiting this information hath there used and exercised, and doth there use and exercise, without any legal warrant, royal grant, or right whatsoever, the office of alderman of the said borough.

Plea by defendant that, under and by virtue of the said charter, and of stat. 5 & 6 W. 4, c. 76, intituled "An Act to provide for the regulation of municipal corporations in England and Wales," one-half of the whole number of aldermen of the said borough, to wit seven of the

said aldermen, were, upon 9th November, 1844, and in every third succeeding year, to go out of office, according to the provisions of the said charter and of the said Act. That, on 9th November, 1859, one *635] half of the *whole number of the said aldermen who had been aldermen of the said borough went out of office. That he, the said William Bradley, was then an enrolled burgess and a councillor, and was duly qualified to be elected an alderman of the said borough. That, on the same 9th November, 1859, he was duly elected by the council of the said borough to be an alderman of the said borough, to supply the place of one of the said aldermen who so went out of office as aforesaid, according to the provisions of the said Act; and that he accepted the said office of alderman.

Replication: That the said William Bradley was not duly elected by the council of the said borough to supply the place of one of the said aldermen. Issue thereon.

At the trial, before Martin, B., at the Yorkshire Summer Assizes, 1860, it appeared that the councillors who voted at the election did so by means of voting papers. These voting papers were handed in, closed, by the voting councillors, and were opened and read by the mayor, who declared six of the candidates, other than the defendant, duly elected, and that there were an equal number of votes for the defendant and one Mr. John Carr. The mayor thereupon gave his casting vote in favour of the defendant, and declared him to have been duly elected an alderman, together with the six others. The voting papers in favour of the defendant were produced at the trial, and from them it appeared that one Elliott, a voter, had written "Wm. Bradley" in the column headed "The christian name and surname of the persons for whom I vote:" and that three other voters, Jones, Stainforth and Unwin, had written respectively in the same column "Willm. Bradley." It was *636] objected thereupon, on behalf of the Crown, that the voting papers so filled up were insufficient. The learned Judge, however, overruled the objection, and the jury returned a verdict for the defendant.

Overend, in last Michaelmas Term, had obtained a rule, calling upon the defendant to show cause why the verdict should not be set aside and a new trial had, on the ground that the learned Judge ought to have decided, and so directed the jury, that the votes in question for the defendant, not specifying his christian and surname as well as his place of residence and description, were bad.(a)

Manisty now showed cause.—The voting papers objected to sufficiently specified the defendant's christian and surname. The election of aldermen in boroughs is regulated by stat. 7 W. 4 & 1 Vict. c. 78,(b) s. 14, which enacts that "Every member of the council, entitled to vote in that election, may vote for any number of persons, not exceeding the number of aldermen then to be chosen, by personally delivering at such meeting, to the mayor or chairman of the meeting, a voting paper containing the christian name and surname of the persons for whom he votes, with their respective places of abode and descriptions, such paper being previously signed with the name of

(a) The rule was granted also upon other grounds, which were discussed in the argument, but are not thought to require a report.

(b) General, public. "To amend" stat. 5 & 6 W. 4, c. 76.

the member of council voting; and the mayor or chairman of the meeting, as soon as all the voting papers shall have been delivered to him, shall openly produce and read the same, and immediately afterwards deliver them to the town clerk, to be kept among the records of the borough; and in case of equality of votes among those entitled to vote the mayor or chairman shall have a casting vote, whether or not he may be entitled to vote in the first instance." No doubt, voting papers which do not contain an accurate description of the place of abode of the party voted for are bad: *Regina v. Deighton*, 5 Q. B. 896 (E. C. L. R. vol. 48); *Regina v. Coward*, 16 Q. B. 819 (E. C. L. R. vol. 71). But, assuming it to be equally necessary for a voting paper to contain the true christian and surname of the candidate, in the present case the contractions of the name "William" adopted by the voters are in common use and equivalent to the name in full. In *Regina v. Mayor of Hartlepool*(a) a signature by the initials of the claimant's christian names to a claim to be inserted in the burgess list of a borough was held sufficient; it appearing that there was no other person in the borough of the same name as the claimant, and that his person and handwriting were well known to the court of revision. [CROMPTON, J.—In the present case you have this further fact in your favour, that the voters, being required to deliver the voting papers personally, can explain any ambiguity in the names filled in.] Moreover, stat. 5 & 6 W. 4, c. 76, s. 142, enacts that "No misnomer or inaccurate description of any person, body corporate, or place named in" "any roll, list, notice or voting paper required by this Act, shall hinder the full operation of this Act with respect to such person, body corporate, or place, provided that the description of such person, body corporate, or place be such as to be commonly understood." (He was then stopped.)

**Overruled and Quia, contra.*—The voting papers are bad, as not complying with the requirement of the statute, that they shall contain the christian name and surname of the person voted for; by which must be meant the names in full. In *Regina v. Avery*, 18 Q. B. 576 (E. C. L. R. vol. 83), this Court held that a signature by surname and the initial of a christian name is a sufficient signature of a voting paper by a burgess voting at the election of councillors for a borough, within the requirements of stat. 5 & 6 W. 4, c. 76, s. 32. That section, however, merely requires the signature to be in "the name of the burgess voting;" but it provides, like the enactment now in question, that the voting paper shall contain the christian names and surnames of the persons voted for: thereby showing, as Crompton, J., there points out, that greater particularity is required in that instance. That decision tends strongly to show that the voting papers in the present case were insufficient. The contraction "Wm." may represent many other names besides William. [WIGHTMAN, J.—It would be for the jury to say whether an ordinary person would not understand it to mean "William."] Contractions of names stand on the same footing as initials. In *Esdaile v. Maclean*, 15 M. & W. 277, it was held that it is informal to describe, in pleading, any of the parties to a bill or note by the initials only of their christian names, without showing that they were so described in the instrument itself,

notwithstanding stat. 3 & 4 W. 4, c. 42, s. 12, which authorizes the use of initials in pleading in such cases. The omission of the christian names of persons mentioned in pleading was formerly ground of special demurrer; *Nash v. Calder*, 5 C. B. 117 (E. C. L. R. vol. 57).
 *639] *The contraction of a christian name is a different thing from the name itself.

(COCKBURN, C. J., was absent.)

WIGHTMAN, J.—I am of opinion that the votes objected to on the ground that the voting papers contained abbreviations of the defendant's christian name instead of the name at full length are good. The statute requires each voting paper to contain the christian name and surname of the persons for whom the vote is given. Now, admitting that a mere initial could not be regarded as a christian name, I think that contractions of a christian name which, like those in the present case, are perfectly well known and in ordinary use, are sufficient to satisfy the statute; just as I should be prepared to hold that a misspelling of a christian name, if not such as to occasion any misunderstanding, would not make the voting paper bad. As therefore the votes tendered for the defendant were good, and he had the mayor's casting vote, he was duly elected, and the rule must be discharged.

CROMPTON, J.—I am of the same opinion. The statute, which appears to have been decided to be imperative, requires that the voting papers shall contain the christian name and surname of the persons for whom the votes are given; together with their respective places of abode and descriptions. I think that this requirement is satisfied, as far as the christian name is concerned, if the voting paper contains something in writing which shows what christian name is intended. As to the present case, although the mere letter W might *640] have been open *to the objection that it possibly represented some other name than William, the contractions "Wm." and "Willm.," though it is just possible that they might refer to some other name, would both be understood by any person reading them to mean William. Whether the question of their meaning be one of law or of fact, the defendant is entitled to our judgment.

HILL, J.—I am of the same opinion. The statute requires as follows.—(His Lordship here read stat. 7 W. 4 & 1 Vict. c. 78, s. 14). Now I think that although an initial cannot be regarded as a christian name, a well-known contraction of a name, which cannot be misunderstood, may be so regarded, and is tantamount to the name in full.

Rule discharged.

THE QUEEN, on the prosecution of the Parishioners of CHRIST-CHURCH, ROTHERHITHE. in the county of SURREY, v. FREDERICK PERRY, Clerk.

By stat. 1 & 2 W. 4, c. 38, s. 16, two churchwardens are to be appointed for every church or chapel built under the provisions of that Act; one by the incumbent, and the other by the renters of pews.

The Marriages Act, 6 & 7 W. 4, c. 85, by sect. 26, empowers the Bishop of a diocese, by license under his hand and seal, to authorize the solemnization of marriages in a district chapel, for persons residing within the district. By sect. 32 the Bishop may, with the consent of the Archbishop of the province, revoke this license.

Stat. 6 & 7 Vict. c. 37, s. 15, enacts that when any church or chapel shall be built in any district, and consecrated as the church or chapel of such district, the district shall, from and after such consecration, be and be deemed to be a new parish for ecclesiastical purposes. And, by sect. 17, in every such case of a district so becoming a new parish, two churchwardens are to be chosen for it; one by the perpetual curate of the new parish and the other by the resident inhabitants having a similar qualification to that which would entitle inhabitants to vote at the election of churchwardens for the principal parish.

Stat. 19 & 20 Vict. c. 104, by sect. 11, empowers the Ecclesiastical Commissioners, upon the application of the incumbent of a district church or chapel, with the written consent of the Bishop of the diocese, to make an order under their seal, authorizing the publication of banns of matrimony and the solemnization therein of marriages, baptisms, churchings, and burials; all the fees for the performance of which offices are to be payable and to be paid to the incumbent. And by sect. 14, wheresoever or as soon as banns of matrimony and the solemnization of marriages, churchings, and baptisms, are authorized to be published or performed in any consecrated district church or chapel, such district not being at the time of the passing of that Act (1856) a separate and distinct parish for ecclesiastical purposes, and the incumbent of which is, by such authority, entitled for his own benefit to the entire fees for the performance of such offices, without any reservations thereout, such district shall become and be a separate and distinct parish for ecclesiastical purposes, such as is contemplated by stat. 6 & 7 Vict. c. 37, s. 15; the church of the district shall be the church of such parish; and all the provisions of stat. 6 & 7 Vict. c. 37, relative to new parishes, upon their becoming such, and to the matters and things consequent thereon, shall extend and apply to the said parish and church as fully and effectually as if it had become a new parish under the provisions of that Act.

The church of C. was built, and had a district assigned to it, under stat. 1 & 2 W. 4, c. 38. In the year 1840 the Bishop of the diocese granted, under stat. 6 & 7 W. 4, c. 85, s. 26, his license for the publication of banns and the solemnization of marriages in the church, and for taking the same fees in respect thereof as were taken in the mother church by the minister and incumbent thereof for the time being; to which the fees for churchings, baptisms and burials were afterwards added. From the consecration of the church down to the issuing of the writ of mandamus in the present case, two churchwardens were chosen for the church in the manner directed by stat. 1 & 2 W. 4, c. 38, s. 16; one by the incumbent, and the other by the pew renters.

Upon demurrer to the return to a mandamus to the incumbent of the district to convene a meeting of the inhabitants to elect a churchwarden, the return alleging that the incumbent and the pew renters had the privilege of electing the churchwardens, and that stats. 6 & 7 Vict. c. 37, s. 15, and 19 & 20 Vict. c. 104, s. 14, were inapplicable: Held that the return was good. That the authority contemplated by stat. 19 & 20 Vict. c. 104, s. 14, was not a revocable license by the Bishop, but an authority under an order of the Commissioners under sect. 11 of that Act; and that therefore the district was not brought within the operation of stat. 19 & 20 Vict. c. 104, s. 14.

Seemle, that stat. 6 & 7 Vict. c. 37, s. 15, is inapplicable to the case of a district constituted, not under that Act, but under stat. 1 & 2 W. 4, c. 38, with a license by the Bishop under stat. 6 & 7 W. 4, c. 85.

MANDAMUS addressed to Frederick Perry, clerk, minister and incumbent of the church or parish of *Christchurch, Rotherhithe, in the county of Surrey. "Whereas the parish of Saint Mary, Rotherhithe, in our county of Surrey, is an ancient parish, and the church thereof, or rectory, within the diocese and subject to the jurisdiction of the Bishop of Winchester; And whereas, in the year 1839, the population of the same parish then amounting to more than 3000 persons, and the existing churches and chapels within the same

parish not affording accommodation for more than one-third of the inhabitants thereof, for the attendance upon divine service according to the rites of the United Church of England and Ireland, a certain *642] additional church called and *known by the name of Christchurch (the site whereof had been duly conveyed to our Commissioners for building new churches) was erected within the said parish under and by virtue of the provisions contained in stat. 1 & 2 W. 4, c. 88, entitled "An Act to amend and render more effectual an Act passed in the 7th and 8th years of the reign of his late Majesty, entitled 'An Act to amend the Acts for building and promoting the building of additional churches in populous parishes,'" and which said additional church was afterwards (that is to say on or about 23d June, 1839), duly consecrated by Charles Richard, Lord Bishop of Winchester, for the performance of divine service according to the rites of the said United Church of England and Ireland, the same having been theretofore endowed with the sum of 1000*l.* secured upon money in the funds, in addition to the pew-rents and profits intended to be taken and to arise from the same church, and a fund having also been provided for the repairs of the said church to the amount and in the manner required by the said statute, and one-third at least of the sittings in the said church having been also set apart and appropriated as free sittings, according to the said statute; And whereas afterwards (that is to say on 7th April, 1840), the said Lord Bishop of Winchester, under and by virtue of the said statute, by a certain indenture by him duly executed under his hand and seal, assigned a separate and distinct district to the said church called Christchurch, and caused a description of the boundaries of the said district so assigned to be registered in the episcopal registry of his diocese, such district then forming part of the said parish of Saint Mary, Rotherhithe; and in and by the said indenture or deed poll the *648] *said Bishop, under and by virtue of stat. 6 & 7 W. 4, c. 85, entitled "An Act for Marriages in England," and with the consent of the patrons and of the rector or incumbent of the said church or rectory of the said parish of Saint Mary, Rotherhithe, then duly testified under their respective hands and seals, granted his license and authority for the publication of banns of matrimony and the solemnization of marriages in the said church called Christchurch, by the minister or incumbent thereof for the time being, of persons residing within the district so assigned to the same church as aforesaid; and he also, and with the like consent, ordered and directed that all such accustomed fees, dues and other emoluments as would have been otherwise paid or payable for or in respect of such banns and marriages to the said rector or incumbent of the said rectory and church of Saint Mary, Rotherhithe, aforesaid, should thenceforth be paid and payable to the minister or incumbent of the said church called Christchurch; and the said Bishop also then caused his said order and direction as to the several offices to be performed in the said church called Christchurch as aforesaid, to be registered in the said episcopal registry of his said diocese; And whereas, by a certain indenture bearing date 6th April, 1840, and then made by and between the Reverend Edward Bliok, clerk, then being the rector or incumbent of the said rectory or church, of Saint Mary, Rotherhithe, of the first

part, the said Lord Bishop of Winchester of the second part, the Master, fellows and scholars of Clare Hall, in the University of Cambridge, the patrons of the said rectory or church of Saint Mary, Rotherhithe, of the third part, and the Reverend John Saunders, then being the minister and incumbent of the *said church called Christchurch, of the fourth part, and duly executed by the [*644 said parties respectively, under their respective hands and seals, reciting, amongst other things, that the said church called Christchurch had been so erected, and that a district had been so assigned to it as aforesaid, but that the same church was not intended to become, under or by virtue of stat. 58 G. 3, c. 45, passed for building and promoting the building of additional churches in populous parishes, the parish church of a district parish, the said Edward Blick, under and by virtue of the said stat. 1 & 2 W. 4, c. 38, aforesaid, and by virtue of any other statutes, or of any other powers by which it was competent for him so to do, and with the consent of the said Bishop, and of the said Master, fellows and scholars of Clare Hall, respectively, granted and declared that one equal fourth part of all such Easter offerings and oblations as should from time to time become due or payable, or but for the same indenture would become due or payable, to or for the benefit of the rector or incumbent of the said rectory or church of Saint Mary, Rotherhithe, and also that all fees, dues and emoluments for or in respect of the churchings, baptisms, marriages and burials, as had been theretofore due to or received by the said Edward Blick, as such rector or incumbent as aforesaid, and as should from time to time thereafter become due or payable from or by any person or persons whomsoever, for or in respect of any services, ceremonies, or duties, performed in the said church called Christchurch, or in any burial ground belonging thereto, should be forever thereafter annexed to the said church called Christchurch, and should from time to time thereafter be receivable and received by or on *behalf of and for the sole and exclusive use and benefit of the minister and incumbent for the time being of the same church; [*645 and the said fees, dues, offerings and emoluments respectively, were by the said Bishop, in and by the said indenture, duly assigned to the said minister and incumbent of the said church called Christchurch, who, under and by virtue of the said indenture and of the statute aforesaid, then became and was entitled to the same for his own sole and exclusive use and benefit, without any reservation thereout; and every such minister and incumbent hath ever since been and is thereby so entitled to the same; which said indenture was duly registered in the episcopal registry of the said Bishop; And whereas, by means of the several premises aforesaid, the said church called Christchurch, before and at the time of the passing of the Act of Parliament made and passed in the Parliament holden in the 19th and 20th years of our reign, (a) entitled "An Act to extend the provisions of an Act of the 6th and 7th years of Her Majesty, for making better provision for the spiritual care of populous parishes, and further to provide for the formation and endowment of separate and distinct parishes," had become and was, within the meaning of the said Act, a consecrated church to which a district belonged, and

wherein bauns of matrimony and the solemnization of marriages, churchings and baptisms, according to the laws and canons in force in this realm, were authorized to be published and performed (the district aforesaid not being at the time of the passing of the said Act a separate and distinct parish for ecclesiastical purposes), and the *646] incumbent of which was by such *authority entitled for his own benefit to the entire fees arising from the performance of such offices, without any reservation thereof, whereby and by means of the said last mentioned Act of Parliament, immediately after the passing thereof, the said district became and was and now is a separate and distinct parish for ecclesiastical purposes, such as is contemplated in the 15th section of the statute made in the Parliament holden in the 6th and 7th years of our reign,(a) entitled "An Act to make better provision for the spiritual care of populous parishes," and the said church called Christchurch, being the church of the said district, then became and was and now is the church of such parish; And whereas all and singular the provisions of the said last mentioned statute, as then amended, relative to new parishes upon their becoming such, and to the matters and things consequent thereon, became and were and now are, under and by virtue of the said Act of Parliament of the 19th and 20th years of our reign, extended and made applicable to the said new parish of Christchurch, and by reason thereof two fit and proper persons duly qualified in that behalf, as required by the said statute so made in the Parliament holden in the 6th and 7th years of our reign, ought in every year to be chosen churchwardens of the same parish, one being chosen by the minister and incumbent of the same parish, and the other by the inhabitants residing therein, and having a similar qualification to that which would entitle inhabitants to vote at the election of churchwardens for the said parish of Saint Mary, Rotherhithe, and such election ought to take place at the usual period of appointing parish officers at *647] *a meeting summoned in such manner as the minister and incumbent of the said parish of Christchurch shall direct; And whereas we have been given to understand and be informed in our Court before us, that, although one churchwarden for the said parish of Christchurch, Rotherhithe, has been duly chosen by you the said Frederick Perry, being the minister and incumbent of the same parish as aforesaid, nevertheless no other churchwarden for the same parish has been chosen by the inhabitants residing therein, and having the qualification aforesaid, and that no meeting of such inhabitants, for the purpose of choosing such churchwarden, has been duly summoned by you the said Frederick Perry, as such minister and incumbent as aforesaid, according to the said statutes, but that on the contrary thereof you, the said Frederick Perry, though requested, as such minister and incumbent as aforesaid, by divers of the said inhabitants to convene and hold such a meeting of the said inhabitants so qualified to vote as aforesaid, for the purpose of choosing such other churchwarden according to the said statutes in that behalf, have wholly neglected and refused, and still do neglect and refuse, so to do, whereby the said parish of Christchurch, Rotherhithe, has been and is wrongfully deprived of the benefit of having such other church-

(a) Stat. 6 & 7 Vict. c. 37.

warden, and the inhabitants of the said parish have been and are prevented from choosing a fit and proper person to fill the said office of churchwarden, although the usual period of appointing parish officers, and the proper time for so choosing such a person as aforesaid to fill the said office of churchwarden, has long since elapsed; in contempt of us, and to the great prejudice and injury of the said parish, and of the said inhabitants thereof, as we have *been [*648 informed from complaint made to us; We, therefore, being willing that a fit and speedy remedy be applied in this respect, as it is reasonable, do command you, the said Frederick Perry, being such minister and incumbent as aforesaid, firmly enjoining you that, immediately after the receipt of this our writ, you do convene and hold a proper meeting of the inhabitants of the said parish of Christchurch, Rotherhithe, duly qualified according to law as aforesaid to vote at the election of churchwardens for the said parish, for the purpose of electing a fit and proper person to serve the office of churchwarden for the said parish of Christchurch, Rotherhithe, for the current year or such part thereof as may remain unexpired, so that such person may be then and there duly elected to serve the said office, according to the laws and statutes in that behalf made and provided, or that you show us cause to the contrary thereof."

Return. That the said church called Christchurch had not, at the time of the passing of the said Act of Parliament made and passed in the Parliament holden in the 19th and 20th years of the reign of our said lady the Queen, in the said writ mentioned, become, nor was it within the meaning of the said Act, a consecrated church to which a district belonged, and wherein banns of matrimony and the solemnization of marriages, churchings and baptisms according to the laws and canons in force in this realm, were authorized to be published and performed, or the incumbent of which was by such authority entitled for his own benefit to the entire fees arising from the performance of such offices without any reservation thereof; And further that the said district did not, by means of the said *last-men- [*649 tioned Act of Parliament, become, nor was nor is it by means of the said Act of Parliament, a separate and distinct parish for ecclesiastical purposes, such as is contemplated in the 15th section of the statute made in the Parliament holden in the 6th and 7th years of the reign of our said lady the Queen in the said writ mentioned. And further that, before and at the time the passing of the said Act of Parliament made in the Parliament holden in the 19th and 20th years of the reign of our said lady the Queen, the said district of Christchurch had and enjoyed, and now has and enjoys, the special right, privilege, and liability, that the churchwardens for the church or chapel of Christchurch should and shall, at the usual period of appointing parish officers in every year, be chosen, one by the incumbent of the said church or chapel for the time being, and the other by the renters of pews in such church or chapel: and that such special right, privilege, and liability was not, nor is the same, taken away, altered, or in anywise affected by the said last-mentioned Act, but still exists in full force and effect: and that on 12th April, 1860, being the usual period of appointing parish officers, two churchwardens were duly chosen in such manner as aforesaid, one by me the said Frederick Perry, and

the other by the pew renters of the said church or chapel of Christchurch, to act as churchwardens for the same for the then current year, which is not yet elapsed; and that they have since then acted and now act as such churchwardens as aforesaid under such special right, privilege, and liability as aforesaid.

Demurrer. Joinder in demurrer:

Badeley, in support of the demurrer:—The return is *bad. *650] The question turns upon stat. 19 & 20 Vict. c. 104, s. 14, which enacts that "Wheresoever or as soon as bans of matrimony and the solemnization of marriages, churchings, and baptisms according to the laws and canons in force in this realm are authorized to be published and performed in any consecrated church or chapel to which a district shall belong, such district not being at the time of the passing of this Act a separate and distinct parish for ecclesiastical purposes, and the incumbent of which is by such authority entitled for his own benefit to the entire fees arising from the performance of such offices without any reservation thereout, such district or place shall become and be a separate and distinct parish for ecclesiastical purposes, such as is contemplated in the 15th section of" stat. 6 & 7 Vict. c. 37, "and the church or chapel of such district shall be the church of such parish, and all and singular the provisions of" stats. 6 & 7 Vict. c. 37, and 7 & 8 Vict. c. 94, "(as amended by this Act) relative to new parishes, upon their becoming such, and to the matters and things consequent thereon, shall extend and apply to the said parish and church as fully and effectually as if the same had become a new parish under the provisions of the said last-mentioned Acts." The 15th section of stat. 6 & 7 Vict. c. 37, therein referred to, enacts that, upon any church or chapel being consecrated as the church or chapel of a district, "such district shall, from and after the consecration of such church or chapel, be and be deemed to be a new parish for ecclesiastical purposes." And the 17th section of the same statute enacts, "That in every such case of a district so becoming a new parish two fit and proper persons" "shall" "be chosen churchwardens *651] for *such new parish, one being chosen by the perpetual curate thereof, and the other by the inhabitants residing therein, and having a similar qualification to that which would entitle inhabitants to vote at the election of churchwardens for the principal parish." Regard being had to these enactments it is evident that so soon as a district church or chapel becomes subject to the operation of stat. 19 & 20 Vict. c. 104, s. 14, churchwardens for the district must be elected by the persons pointed out by stat. 6 & 7 Vict. c. 37, s. 17; which last enactment is but in affirmance of the common law, by which, when a district or place becomes a separate parish, all the common-law rights attaching to the parishioners at large attach, so far as the district or place is concerned, to its inhabitants. The two statutes must be read together; and indeed in many respects they supplement each other: for instance, stat. 19 & 20 Vict. c. 104, though in sect. 9 it provides for the appointment of parish clerks and sextons, is silent as to the election of churchwardens; whereas stat. 6 & 7 Vict. c. 37, is silent and operative, respectively, in the contrary direction. The question, therefore, is reduced to this, whether the district of Christchurch, Rotherhithe, has become subject to the operation of stat. 19

& 20 Vict. c. 104, s. 14. And that it has so become appears from the facts that the Bishop of the diocese has granted his license and authority for the publication of banns of matrimony and the solemnization of marriages in the church of the district, and that the incumbent is entitled for his own benefit to the entire fees therefrom. It follows that the privilege alleged in the return, for one of the churchwardens to be elected by the renters of pews, instead of by the inhabitants, cannot be supported, *being directly opposed to the provisions [*652 of stat. 6 & 7 Vict. c. 37, s. 17. The other side may rely upon stat. 1 & 2 W. 4, c. 38, s. 16, which enacts "That two fit and proper persons shall be appointed to act as churchwardens for every church or chapel built or appropriated under the provisions of this Act, at the usual period of appointing parish officers in every year, and shall be chosen, one by the incumbent of the church or chapel for the time being, and the other by the renters of pews in such church or chapel." That Act, however, ceases to have any application when a district becomes a separate and distinct parish under the provisions of the later statutes. Churchwardens elected by pew-renters would not have the full powers of parish churchwardens, chosen by the parishioners at large.(a)

Dr. *Phillimore*, contra, was directed by the Court to confine his argument to the meaning of the word "authorized" in stat. 19 & 20 Vict. c. 104, s. 14.

The publication of banns and the solemnization of marriages, &c., in the church of the district of Christchurch, have not been authorized within the meaning of that section. No doubt, as stated on the other side, stats. 6 & 7 Vict. c. 37, and 19 & 20 Vict. c. 104, are in many respects to be read together. Now stat. 6 & 7 Vict. c. 37, enacts, by sect. 9, "That if at any time it shall be made to appear to the" Ecclesiastical Commissioners for England, that it would promote the interests of religion that any part or parts of any "parish or parishes, chapelry or chapelries, district or districts, or any extra-parochial place or places, or any part or parts thereof, should be *constituted a separate district for spiritual purposes, it shall [*653 be lawful, by the authority aforesaid, with the consent of the Bishop of the diocese under his hand and seal, to set out by metes and bounds, and constitute a separate district accordingly;" and that every scheme for constituting any such district shall be laid before Her Majesty in council; and the order of council ratifying such scheme is, by sect. 10, to be registered by the registrar of the diocese. By "the authority aforesaid," in sect. 9, must therefore be meant the authority of the Ecclesiastical Commissioners, ratified by an order in council. Then stat. 19 & 20 Vict. c. 104, s. 11, enacts that "From and after the commencement of" that "Act, the Commissioners may, if they shall think fit, upon application of the incumbent of any church or chapel to which a district shall belong, with the consent in writing of the Bishop of the diocese, make an order, under their common seal, authorizing the publication of banns of matrimony and the solemnization therein of marriages, baptisms, churchings, and burials, according to the laws and canons now in force in this realm;

(a) He made some further points which, as they are not noticed in the judgment, are here omitted.

and all the fees payable for the performance of such offices, as well as all the mortuary and other ecclesiastical fees, dues, oblations, or offerings arising within the limits of such district, shall be payable and be paid to the incumbent of such district." The authorization, therefore, of the publication of banns and the performance of marriages, &c., mentioned in sect. 14 of that Act, must mean an authorization by order of the Commissioners under sect. 11; and can have no reference to an authorization by license of the Bishop of the diocese, *654] granted under The Marriage Act, 6 & 7 W. 4, c. 85, sect. *26, which license is limited to the solemnization of marriages, and may, by sect. 32, be revoked at any time by writing under the hand and seal of the Bishop, with the consent in writing of the Archbishop of the province. If such a license satisfies the requirements of stat. 19 & 20 Vict. c. 104, s. 14, a district may one day be a separate parish and the next, by reason of a revocation of the license, cease to be so: whereas, if an order of the Ecclesiastical Commissioners is rendered necessary by that section, no such anomaly can result: such an order, once made, being irrevocable. *Cur. adv. vult.*

WIGHTMAN, J., now delivered the judgment of the Court. (a)

We are of opinion that the defendant is entitled to our judgment upon this demurrer. It is clear that, unless the district of Christchurch has become a separate and distinct parish for ecclesiastical purposes, by virtue of the provisions of stat. 19 & 20 Vict. c. 104, the mandamus cannot be supported. And we think that the district of Christchurch had not, at the time of passing that Act, the requirements necessary to convert it into a parish of itself, by virtue of that statute. The new church called Christchurch was built and endowed, and had a district assigned to it and a fund provided for the repairs of the church, in the years 1839 and 1840, under the provisions of stat. 1 & 2 W. 4, c. 38; and, in 1840, the Bishop, under the provisions of stat. 6 & 7 W. 4, c. 85, granted his license and authority for the publication *655] of banns and solemnization of marriages in the new church called Christchurch, and for taking the same fees in respect thereof as were taken in the mother church by the minister or incumbent thereof for the time being; to which the fees for churchings, baptisms and burials were afterwards added. The Bishop's license may however, as expressly enacted by the 32d section of the last-mentioned Act, be revoked by the Bishop with consent of the Archbishop; and, by the proviso at the end of the 26th section of the same Act, marriages could only be solemnized in the new district church until the license should be revoked. By the 16th section of stat. 1 & 2 W. 4, c. 38, under which the new district church called Christchurch was built and endowed, two churchwardens are to be chosen, one by the incumbent of the new church, the other by the renters of pews in the church. The church and district of Christchurch having been thus created under the provisions of stat. 1 & 2 W. 4, c. 38, and publication of banns and solemnization of marriages having been authorized by the Bishop under stat. 6 & 7 W. 4, c. 85, as before mentioned, things remained in the same state, the renters of pews choosing one of the churchwardens, until the present question was raised, and it was said that, immediately after the passing of stat. 19 & 20

(a) Cockburn, G. J., Wightman, Hill and Blackburn, J.

Vict. c. 104, the district of Christchurch became a separate and distinct parish by the force and operation of stat. 19 & 20 Vict. c. 104, s. 14, by which it is enacted that "whosoever or as soon as banns of matrimony and the solemnization of marriages, churchings, and baptisms according to the law and canons in force in this realm are authorized to be published and performed *in any consecrated church or chapel to which a district shall belong, such district [*656 not being at the time of the passing of this Act a separate and distinct parish for ecclesiastical purposes, and the incumbent of which is by such authority entitled for his own benefit to the entire fees arising from the performance of such offices without any reservation thereout, such district or place shall become and be a separate and distinct parish for ecclesiastical purposes, such as contemplated in the 15th section of" stat. 6 & 7 Vict. c. 37; "and all" "the provisions of" that Act "relative to new parishes, upon their becoming such," "shall" "apply to the said parish" "as if" it "had become a new parish under" stat. 6 & 7 Vict. c. 37. By the 17th section of the last-mentioned Act one of the churchwardens of the new parish is to be elected by the incumbent and the other by the inhabitants. It was said for the prosecution that, the Bishop having authorized the publication of banns and the solemnization of matrimony in the new church called Christchurch, the condition required by the 14th section of stat. 19 & 20 Vict. c. 104, was fulfilled, and that the district became a distinct parish immediately upon the passing of that Act. We are however of opinion that the authority contemplated and intended by that section of the Act was not a revocable license by the Bishop; but an authority under an order of the Commissioners under the 11th section of the Act, which expressly empowers the Commissioners, if they think fit, to authorize the publication of banns and solemnization of matrimony and baptisms, churchings and burials; and all the fees payable for such offices to be paid to the incumbent of the district. This authority, if it had been *granted by the order of the [*657 Commissioners, would be of a permanent and irrevocable character; but it has not been granted; and we are of opinion that the revocable authority or license of the Bishop is not enough to bring this district within the 14th section of stat. 19 & 20 Vict. c. 104. We may observe that the 15th section of stat. 6 & 7 Vict. c. 37, does not appear to us to be applicable to this case of a district not constituted under that Act but under stat. 1 & 2 W. 4, c. 38, with a license by the Bishop under stat. 6 & 7 W. 4, c. 85. Upon the ground, therefore, that the new church called Christchurch was not one in which banns of matrimony and the solemnization of marriages, churchings and baptisms were authorized to be published and performed, within the meaning of the 14th section of stat. 19 & 20 Vict. c. 104, we think that the mandamus cannot be maintained, and that the defendant is entitled to succeed upon this demurrer. Another point arose, upon the effect to be given to the 29th section of the Act, upon which we do not think it necessary to give any opinion, as upon the other ground we think that there should be judgment for the defendant.

Judgment for the defendant, with costs.

*658] *The QUEEN v. LEATHAM. Feb. 12.

The Corrupt Practices at Elections Act, 15 & 16 Vict. c. 57, s. 8, requires all persons summoned to give evidence before Commissioners appointed to inquire into such practices to attend the Commissioners and answer all questions put by them, and produce all books and documents bearing on the inquiry. "Provided always, that no statement made by any person in answer to any question put by such Commissioner shall, except in cases of indictment for perjury committed in such answers, be admissible in evidence in any proceeding, civil or criminal."

Held that, notwithstanding this proviso, a document already in existence before the time at which a witness is examined before the Commissioners, and referred to by him in the course of that examination, is admissible in evidence against him in subsequent proceedings, other than the specified indictment for perjury, if it be otherwise admissible, and be proved by independent evidence aliunde.

Per Hill, J.—Assuming that such a document, if communicated by the witness to the Commissioners under compulsion, is privileged from production in the subsequent proceedings, independent secondary evidence of its contents is then admissible.

THIS was an information filed by the Attorney-General against the defendant; charging him, in the first count, with having, on 26th April, 1859, he being then a candidate at the election for a member of Parliament for the borough of Wakefield, advanced to one Thomas Field Gilbert 2000*l.*, with intent that it should be expended in bribery at the said election, against The Corrupt Practices Prevention Act, 1854, 17 & 18 Vict. c. 102, s. 2 (5). There were other counts charging the defendant with separate and distinct acts of bribery.

Plea. Not guilty.

At the trial, before Martin, B., at the Yorkshire Summer Assizes, 1860, it appeared that the defendant was a candidate at the election for a member of Parliament for the borough of Wakefield, which took place on 2d May, 1859. The defendant, through Messrs. Overend & Gurney, secretly forwarded to one Joseph Wainwright, the solicitor employed by him in the election, a large sum of money for election purposes. A letter, dated 5th August, 1859, from the defendant to Wainwright, was produced and tendered in evidence for the

*659] prosecution; but objected to on the part of the defendant, as being excluded from evidence by stat. 15 & 16 Vict. c. 57, ss. 8, 9.(a) In order to support the objection, it was shown that Commissioners had been appointed under that Act, in August, 1859, to inquire into the corrupt practices alleged to have taken place at the Wakefield election; and that both the defendant and Wainwright had been examined by them. The defendant, who was called by the Commissioners before Wainwright, when under examination was asked whether he had got the letter which Wainwright wrote to him since the petition against the election; and he answered "Yes, at home; it was asking me to state what sums I considered him accountable for; I wrote them all down, and I sent them to him." The Commissioners expressed a wish to see this letter from Wainwright to the defendant; and the defendant afterwards handed it to them. Wainwright was afterwards called before the Commissioners; and after he had been examined, but during the pendency of the commission, he, in pursuance of a promise made to the Commissioners, sent all the documents which he could find to Mr. Dew, their secretary, amongst which was the letter of 5th August, 1859, from the defendant to Wainwright.

(a) "Corrupt Practices at Elections Act." See these sections cited in the argument.

The learned Judge admitted the letter, which was as follows:—

"Hemsworth Hall, Pontefract.

August 5, 1859.

"Dear Sir,

"In reply to your inquiry I beg to hand you on the other side the sums of money which were advanced by *myself and friends for election purposes. I shall be very glad to see my account [*660 settled. We arrived safely here on Tuesday. I remain,

Yours truly,

"J. Wainwright, Esq."

"W. H. LEATHAM."

"1859.		£.	s.	d.
Jan.	8. To loan on promissory note	500	0	0
April	9. To loan per Overend, Gurney & Co.	1000	0	0
"	20. Ditto ditto	500	0	0
"	26. Ditto ditto	1000	0	0
May	2. To check on Leatham, Tew & Co.	200	0	0
"	7. Ditto ditto	500	0	0
July	26. To sums, per election auditor paid by Leatham, Tew & Co.	461	18	8
		<hr/> £4161 18 8		
July.	To Mr. Wyatt, on account of petition expenses	800	0	0
		<hr/> £4461 18 8."		

The letter from Wainwright to the defendant, supposed to be dated 4th August, 1859, to which the above letter was an answer, was then called for by the prosecution, who had given the defendant notice to produce it; and, it not being forthcoming, the prosecution, without any objection on the part of the defendant, called Wainwright, who stated that the substance of the letter was that "I wished to know if the defendant could tell me what were the amounts he charged me with."

The jury returned a general verdict of Guilty.

*Sir Fitzroy Kelly, in last Michaelmas Term, obtained a rule, [*661 calling on the Attorney-General to show cause why there should not be a new trial, on the grounds, first, that there was no evidence of a payment to Gilbert, to support the first count; secondly, that the contents of the letter from Wainwright to the defendant, and the defendant's letter to Wainwright in answer, were improperly admitted in evidence.

Sir W. Atherton, Solicitor-General, now showed cause.—(He consented, in the outset, to enter a Nolle prosequi as to the first count.) As to the second ground on which the rule was obtained, the learned Judge was right in admitting the evidence objected to. First, the letter of 5th August, 1859, from the defendant to Wainwright, was per se clearly admissible, and there is nothing in the provisions of The

Corrupt Practices at Elections Act, 15 & 16 Vict. c. 57, to exclude it from proof. Sect. 8 of that statute enacts that "It shall be lawful for" the "Commissioners, by a summons," "to require the attendance before them" "of any persons whomsoever whose evidence, in the judgment of such Commissioners," "may be material to the subject-matter of the inquiry to be made by" them, "and to require all persons to bring before them such books, papers, deeds, and writings as to such Commissioners" "appear necessary for arriving at the truth of the things to be inquired into by them under this Act; all which persons shall attend such Commissioners, and shall answer all questions put to them by such Commissioners touching the matters to be inquired into by them, and shall produce all books, papers, deeds, and writings required of them, and in their custody or under their control, *662] according to the tenor *of the summons: Provided always, that no statement made by any person in answer to any question put by such Commissioner(s) shall, except in cases of indictment for perjury committed in such answers, be admissible in evidence in any proceeding, civil or criminal." This section excludes from evidence, in proceedings subsequent to the inquiry before the Commissioners, statements only made by a witness in answer to the Commissioners' questions: and it is impossible to maintain that the letter in question was such a statement. If it be a statement at all it is not a statement made in answer to a question by the Commissioners. The letter was not produced to the Commissioners during Wainwright's examination, but sent to them afterwards by him; and the fact that it was referred to in the course of the Commissioners' inquiry cannot preclude it from being proved by independent evidence in a subsequent civil proceeding. Secondly, the objection as to the admissibility of evidence of the contents of Wainwright's letter to the defendant ought not to have been open to the defendant on moving for the rule, as it was not taken at the trial; and, if now open to him, is untenable, the letter being referred to in the defendant's answer to it of 5th August, 1859; to explain which reference, in justice to the defendant, was the sole object which the prosecution had in view in adducing the evidence. (He was then stopped by the Court.)

Sir Fitzroy Kelly and Quain, contra.—The policy of the Legislature in passing stat. 15 & 16 Vict. c. 57, was to give every facility for the *663] full disclosure of corrupt *practices committed at elections for members of Parliament, and to protect persons making a full disclosure from all subsequent liability in respect to the matters disclosed. The power given to the Commissioners by sect. 8 to call before them all persons whomsoever whose evidence they may consider material, is very large, and must be taken in connection with sect. 9, which protects every person who has been engaged in any corrupt practice at an election, and who is examined as a witness, and gives evidence touching such corrupt practice before the Commissioners, and who upon such examination makes a true discovery to the best of his knowledge touching all things to which he is so examined, from all penal actions, forfeitures, punishments, disabilities, and incapacities, and all criminal prosecutions, for anything done by him in respect of such corrupt practice; and enacts that no person shall be

excused from answering any question put to him by the Commissioners on the ground of any privilege, or on the ground that the answer to such question will tend to criminate him. The spirit, if not the letter of this enactment, is, that a witness who divulges all he knows, whether by means of oral evidence, or by the production of written documents, shall be exempt from having his words or documents afterwards used against him in any proceeding founded upon his alleged corrupt practices. Moreover, the protection accorded, by the proviso to sect. 8, to statements made by witnesses in answer to questions by the Commissioners, extends to documents referred to in, and thereby made part of, such statements. Suppose the defendant had been asked by the Commissioners, "What sums of money, and for what purposes, did you remit to Wainwright?" and had answered "I *remitted him certain moneys for certain purposes stated in a letter which I sent him:" under the first clause of sect. 8 the [*664 defendant would be compellable to produce this letter, and it would be most unfair if, after its compulsory production, it could be turned against him. If the Court construe the Act as not privileging documents so produced from being afterwards given in evidence against those producing them, they will hold out an inducement to persons implicated in bribery to destroy all documents tending to criminate them; and thus the object of the Legislature will be in great measure defeated. [CROMPTON, J.—It may be urged, on the other hand, that, upon your construction of the statute, parties who choose to make any document a part of their statement before the Commissioners, may thereby defeat the ends of justice in any subsequent civil action involving that document.] It is not necessary to go to the length of saying that such a document would not be admissible in any subsequent action; the Act must be taken to refer to any subsequent proceeding only, instituted in respect of corrupt practices at an election, imputed to a witness before the Commissioners.

(WIGHTMAN, J., was present during part of the argument, but left before its conclusion.)

CROMPTON, J.—I am of opinion that this rule should be discharged. I cannot say that I have, from the outset, entertained any doubt as to the plain meaning of this Act of Parliament. It seems to me very clear that the letters in question are not excluded from being given in evidence by anything in the 8th section. On the facts of the case, indeed, it is unnecessary to say what *the construction of that section is, because the one important letter, that of 5th August, [*665 1859, from the defendant to Wainwright, was not sent to the Commissioners by the defendant at all, but by Wainwright, and cannot, possibly, therefore, be regarded as a statement by the defendant to the Commissioners. I think, however, that the true construction plainly is that a document already existing before, and referred to by a witness in the course of, the examination before the Commissioners, is not, if admissible evidence per se, protected from production in subsequent proceedings, upon due proof of it being then given aliunde, by proof of handwriting, and so forth. If the witness chooses to make his statement to the Commissioners in writing, such writing will be privileged; but mere reference in the statement to a pre-existing writing can confer no privilege on the latter. Were we to hold

otherwise, we should put a forced construction on the provisions of the Act. The Legislature first empowers the Commissioners to summon before them all persons whose evidence may be material, and to require them to produce all books, papers, deeds and writings bearing on the inquiry; then follows an enactment making it compulsory on all such persons to attend and produce all documents, and answer all questions put to them by the Commissioners; and, lastly, there is a proviso "That no statement made by any person in answer to any questions put by such Commissioners shall, except in cases of indictment for perjury committed in such answers, be admissible in evidence in any proceeding, civil or criminal." Now, as I have said already, it is clear to my mind that this proviso refers to a statement only, or to something which is in the nature of a statement, and does not include documents referred to in a *statement. Again, I cannot read the words "any proceeding, civil or criminal" as restricted to proceedings taken under the Act. Had it been necessary to decide the point, I should have been prepared to hold that the Legislature meant to protect the witness from having his statements given in evidence against him in any subsequent proceedings whatever, the specified indictment for perjury only excepted. For instance, his statement could not be used against him to prove that he had signed a deed, or had signed, or forged, a bill of exchange. From all further liability in respect of statements made under legislative compulsion I think that the Legislature meant to give, and have rightly given, the witness relief; but I do not see why we should infer that they intended to protect him from having documents used against him, a clue to which is first procured in the course of his examination. It is reasonable to suppose that such an intention, had it existed, would have been plainly expressed; on the other hand, such an enactment would have introduced great inconvenience, giving rise in every case to the necessity for an inquiry, in all subsequent proceedings, as to whether or not the clue which led to them was obtained from something let fall by the defendant when before the Commissioners, and thereby opening as wide a field for investigation as can possibly be conceived. The obvious meaning of the word "statement" in the proviso to the 8th section of the Act is a statement made for the first time before the Commissioners; which statement alone is privileged. In the analogous case of confessions by persons accused of crimes, they cannot be used against such persons if obtained from them under the compulsion of a threat, or the inducement of a promise; but matters to which *such a confession gives a clue may nevertheless be unexceptionally put in evidence. For instance, if stolen goods or a murdered body are or is found in a place indicated by the confession, this fact may be given in evidence. So, also, in my opinion, might a letter be put in evidence against a prisoner, in which he has given an account of the crime laid to his charge, and which he has, in a confession not itself admissible against him, stated will be found in his house. That case is precisely analogous to the present. But I rest my judgment mainly on the ground that, while the statute has plainly said that statements by a witness before the Commissioners shall be protected, it has nowhere said, either expressly or by implication, that documents referred to in such statements shall be likewise

protected. I may add that my brother Wightman, so far as he heard the argument, fully agreed, in the conclusion at which we have arrived.

HILL, J.—I am of the same opinion. The rule before the Court asks for a new trial upon two grounds, the improper admission in evidence of the defendant's letter of the 5th of August, and of the contents of the letter to him to which that letter was an answer. Now, if necessary, the rule might be disposed of on very narrow grounds. The letter of the 5th of August was not in any way produced before the Commissioners by the defendant; so that it is idle to say that any privilege acquired by the defendant from his examination by them attaches to that letter. It was sent to the Commissioners by Wainwright, through whose examination alone its existence was disclosed. Then, as to the admissibility of evidence of the contents of Wainwright's *letter to the defendant, to which that of the 5th of August was an answer, it would be sufficient to say that, according to the Judge's notes of the trial, no objection whatever was taken to the question put by the prosecution to Wainwright as to its contents, or to the Judge's reception of his answer. And the Solicitor-General has stated to-day in Court, that the object of the prosecution in asking the question was that, in fairness to the defendant, it might appear what was the letter to which the defendant's letter of the 5th of August referred. Assuming, however, that the objection had been duly taken to the admissibility of secondary evidence of the contents of this letter (which I will call the letter of the 4th of August), on the ground that the letter itself had been communicated by the defendant to the Commissioners, in obedience to their command, I should say that the evidence was admissible, even if the letter itself was not; always supposing that the secondary evidence tendered was distinct and independent. It is a well established rule of law that if a document cannot be proved in Court because of the privilege against its production enjoyed by the person in whose possession or custody it is, independent secondary evidence of its contents is admissible. But, further, I do not think the letter in question would have been privileged from production. The decision of this point turns on the construction of the proviso to the 8th section of the statute. I wish to state my opinion, and the reasons for it, upon this point: though it is unnecessary that I should do so at length, after the full consideration given to the meaning of the Act by my Brother Crompton, in whose judgment I fully concur. I may say, however, that I consider it a very fallacious mode of argument to contend that the *Legislature ought to have intended so and so; and that because such ought to have been, such was, its intention. The true mode of ascertaining the intention is, to look to the language of the Act, and, having regard to the object for which it was enacted, to construe that language according to its plain grammatical meaning, unless it be directly repugnant to the object stated on the face of the Act. Now the language of the 8th section of the Act before us is as follows. [His Lordship read the section, except the proviso.] Two things are thereby required of the witnesses who attend before the Commissioners: they are to answer all questions put to them touching the inquiry; and to produce all books, papers and other documents, according to the tenor of the

summons. Then follows the proviso "That no statement made by any person in answer to any question put by such Commissioner shall, except in cases of indictment for perjury committed in such answers, be admissible in evidence in any proceeding, civil or criminal." Plainly and literally construed, this proviso protects a witness in respect of the performance of his first duty only, that, namely, of answering all questions put to him. We are asked to extend its operation to all documents which the witness, in pursuance of the duty secondly imposed upon him, produces according to the tenor of the summons. I think, however, that the Legislature must be taken to have intended to leave all such documents as had an independent existence prior to the statement of the witness before the Commissioners, as unprotected as they were before, even although the witness should, in the course of his statement, refer to them; and that *670] were we to hold otherwise "we should be ourselves legislating instead of construing the Act. For these reasons I think that the rule should be discharged.

BLACKBURN, J.—I also think that the rule should be discharged. I will assume as a fact (though I doubt whether it is established by the notes of the Judge who tried the case) that the existence of this letter was first mentioned to the Commissioners by the defendant. But even then the only question is, what does the Act mean? The Legislature, with a view to the full disclosure of the corrupt practices into which the Commissioners are to inquire, enacts that the witnesses who attend before them shall answer all questions and produce all documents bearing on the facts. The Act then protects a witness, who, in any statement in answer to the Commissioners' questions, may have criminated himself, from liability to subsequent proceedings in respect of matters fully and truthfully disclosed by him. The argument for the defendant appears to come to this, that the proviso to the 8th section enacts in effect that if the witness has made any statement to the Commissioners concerning any fact or document, or given the first clue to that fact or document, the fact or document shall not be provable against him in any subsequent proceedings except an indictment for perjury, by independent evidence, however admissible such evidence, but for the statute, would be. Now I quite agree with my Brother Hill that we must construe the Act according to its plain words, and I altogether fail to see how those words can warrant any such a conclusion as we are asked to come to. I own, *671] further, that, were it my "province to consider what it would have been wise for the Legislature to have enacted, I should say that an enactment that nothing, the first clue to which was given by a witness under examination by the Commissioners, should be provable against him by evidence aliunde, would have been very unwise; would have encouraged rather than checked the corrupt practices which the Act seeks to put a stop to; and would have introduced excessive practical inconvenience into *nisi prius* inquiries. Such an enactment would have necessitated an investigation, as to every species of evidence tendered in subsequent proceedings against one who had been examined by the Commissioners, into the question whether he had not, when before them, given the first clue to it. Very clear and express language would be necessary to satisfy me

that the Legislature had enacted anything of the kind. In the present case such language is altogether wanting, and we are virtually asked to interpolate into the Act words which we do not find there, and which, whether in our opinion judicious or not, we have no power to introduce.

Rule discharged.

***GOFF v. The GREAT NORTHERN Railway Company. [*672**
Feb 9, 13.

A railway Company, though it be a corporation, is liable in an action for false imprisonment, if that imprisonment be committed by its authority. Such authority need not be under seal; but it lies upon the plaintiff to give evidence justifying the jury in finding that the persons actually imprisoning him, or some of them, had authority from the Company to do so.

The Railways Clauses Act, 1845, 8 Vict. c. 30, by sects. 103, 104, imposes a penalty on any person travelling on a railway without having paid his fare, with intent to avoid payment thereof; and empowers all officers and servants on behalf of the Company to apprehend such person until he can conveniently be taken before a justice.

Held that, inasmuch as the exigency of deciding whether or not a particular passenger shall be arrested by a railway Company's servants under this statute must be naturally expected to arise frequently in the ordinary course of the Company's business, and is of such a nature that the decision must be made promptly on the Company's behalf, it is a reasonable inference that the Company have on the spot, at their stations, officers with authority to make the decision promptly for them.

In an action against a railway Company for the false imprisonment of plaintiff on an unfounded charge under the statute, the evidence for plaintiff showed that he, having travelled on defendants' line with a return ticket from L. to W. and back, at the end of the return journey gave up to defendants' ticket collector at the L. station the return half of another ticket which had then expired, and which he had put in his pocket by mistake for the right one. The ticket collector thereupon took him to the ticket office, where he explained the mistake. Thence the collector took him to defendants' paid inspector of police at the station, and the collector and inspector thence took him to the office, also at the station, of the superintendent of the line, who, refusing to accept plaintiff's explanation, said to the inspector, "I think you had better take him, but first you had better obtain the concurrence of the secretary." The inspector thereupon left, but returned shortly afterwards (whether or not having obtained the secretary's concurrence did not appear), when he directed a police constable, also in defendants' pay, to take plaintiff before a magistrate on the charge. The constable did so, and the magistrate, plaintiff's story proving true, dismissed the complaint. Held, that the conduct of all defendants' other officers, in referring to the superintendent of the line as the superior authority, was sufficient evidence to go to the jury that he was an officer having authority to act for defendants in arresting plaintiff.

DECLARATION: For that defendants assaulted plaintiff and took him into custody and to a police station, and imprisoned and detained him there without reasonable and probable cause; and took him before a magistrate upon a false and unfounded charge of having committed an offence punishable by law, which charge the said magistrate, on hearing, dismissed.

Plea. Not guilty. Issue thereon.

*The action was brought by the plaintiff, a builder and carpenter working on his own account, against the defendants for [*673 taking him into custody and before a magistrate on a charge of attempting to defraud them.

The cause was tried before Blackburn, J., at the Surrey Summer Assizes, 1860, when a verdict was found for the plaintiff, with 50*l.* damages; leave being reserved to the defendants to move to enter a nonsuit if the Court should be of opinion that there was not sufficient

evidence upon which the jury could properly find that the defendants were liable for the imprisonment of the plaintiff.

Hawkins had obtained a rule calling upon the plaintiff to show cause why a nonsuit should not be entered, or why there should not be a new trial on the ground that the damages were excessive.

Montagu Chambers and *Watkin Williams* showed cause. (a)

Hawkins and *J. C. Mathew* supported the rule.

The facts and the arguments are sufficiently disclosed in the judgment of the Court. The following cases, however, in addition to those mentioned in the judgment, were cited in argument: *Great Northern Railway Company v. Harrison*, 10 Exch. 376, *Maund v. Monmouthshire Canal Company*, 4 M. & G. 452 (E. C. L. R. vol. 43).

Our. adv. vult.

*674] *BLACKBURN, J.*, now delivered the judgment of the Court.

This was an action against The Great Northern Railway Company, for giving the plaintiff into custody and causing him to be taken before a magistrate on an unfounded charge of travelling in a carriage of the Company without having previously paid his fare, with intent to avoid payment thereof. Plea, Not guilty. On the trial, before me, at the last Guildford Assizes, there was no doubt that the plaintiff was in fact imprisoned and taken before the magistrate on the charge, but the counsel for the defendants objected, at the close of the plaintiff's case, that there was no evidence on which the jury could properly find that the defendants, the railway Company, were liable for this imprisonment. I was of opinion that it was a question for the jury, but reserved leave to enter a nonsuit in case the Court should be of opinion that there was not sufficient evidence. No evidence was called for the defendants. The question was left to the jury, who found for the plaintiff. No complaint has been made of the manner in which the question was submitted to the jury, if there was evidence; but a rule was obtained by Mr. *Hawkins* to enter a nonsuit, which has been argued before my Brothers *Wightman*, *Crompton*, and *Hill*, and myself.

From the nature of the question it becomes important to state precisely what the evidence at the trial was. The plaintiff was called as a witness on his own behalf. He gave evidence that, on Saturday, the 10th of March, he, being in London, took a second class return ticket by the Great Northern Railway to Wood Green and back to London. This ticket being issued on a Saturday was available as a

*675] return ticket on the Monday following. On arriving at home, at Wood Green, he placed on the chimney piece the half ticket, which would have been available on Monday for his return. It happened that his wife's sister had, on Thursday, the 8th of March, come to visit her sister with a return ticket available that day, and had placed the half of her ticket on the same chimney piece. She had been persuaded to stay over the night, and, her half ticket not being available after Thursday, she went away leaving it there; and the plaintiff on the Monday took by mistake his sister-in-law's half ticket, which would have been available for her on Thursday, the 8th of March only, supposing it to be his own half ticket available for him on Monday the 12th of March. On his arrival at King's Cross

(a) Saturday, February 9th, before *Wightman*, *Crompton*, *Hill* and *Blackburn, J.*

he gave up this, the wrong ticket, supposing it to be his own, the right one. He then proceeded in his evidence to give the following account of what took place. "On arriving at King's Cross the collector of tickets took the ticket. He left, and returned with another collector. One of them said, 'You have got a wrong ticket.' I said 'I am not aware of it.' I told him I had got it at ten minutes past 5 (i. e. on Saturday). He said 'You will take the consequences.' Then the train went on to the platform: there the collector who first came to me accompanied me to the ticket office, where the clerk who issues the tickets sits. The ticket clerk referred to a book, and said 'This ticket was issued on the 8th.' Then it struck me how the mistake had occurred, and I said 'I can account for it: one of my wife's sisters had paid her a visit, and had no doubt left this half ticket, which I must have taken in mistake.' I then went with the collector to the inspector of police in the station. They called him Mr. Williams. I have repeatedly seen him on the *platform giving directions to the police and the other servants of the Company. He [*676 immediately said 'I saw this man at the half-past five train on Saturday.' I said 'Yes; you were settling a disputed cab fare.' We then went to an office. I think 'Superintendent of the Line' was on the door. I had before given my address, and told him what I supposed was the explanation. The superintendent of the police explained it to the superintendent of the line. I asked them to send to the station-master at Wood Green, Mr. Pickett, who knew me and my house. They said Wood Green was the worst station on the line for transferring tickets, and treated it as if I was telling an untruth. The superintendent of the line said 'I think you had better take him, but first you had better obtain the concurrence of the secretary.' First, he said, 'Will he pay the fare?' I said 'I can't, for I have only sixpence.'" (The fare, it appeared from the other evidence, was sevenpence). "I had a few tools, which I offered to leave. Then the superintendent of the line said, 'You had better obtain the concurrence of the secretary.' The police inspector then left me. In a few minutes he returned. He said to a man in plain clothes, 'Take this man to Platt Street station, and charge him with having travelled in a second class carriage without having paid his fare.' " The plaintiff was accordingly taken to the station, and before a magistrate; the charge was made, and the different railway servants gave evidence. On the investigation it appeared that his story was true, and he was in the result discharged.(a) When the plaintiff's *attorney [*677 applied for compensation, a letter was written in answer by the secretary, in which he did not state that the persons apprehending the plaintiff acted on their own responsibility(b) The only other

(a) The plaintiff was detained from 10 A. M. till 4 P. M. on the Monday, and was remanded by the magistrate on his own recognisance till the next day, when, on producing the right half-ticket, he was discharged.

(b) The letter of the plaintiff's attorney and the secretary's answer were as follows:—

"Sir,

" 30th March, 1860.

"I have been consulted by Mr. Henry Goff, of Wood Green, Tottenham, with reference to the very unjustifiable conduct of yourself and the superintendent of the line on the 12th instant, in having him given in charge and taken to the Clerkenwell Police Court upon an unfounded accusation of travelling in a second class carriage without having previously paid his fare. It appears that in the hurry of leaving his home he had unconsciously taken a return ticket issued to another member of his family on the 8th of March

*678] evidence: *bearing on the question before us was that of William Ramsden, who gave evidence that he was a police constable employed by The Great Northern Railway Company. The Great Northern Railway Company's police inspector directed him to take the plaintiff, and charge him with travelling without having paid his fare, with intent to avoid paying his fare. This witness said that he was paid by the Company, and so, he believed, was the inspector.

In determining whether there should have been a nonsuit or not, we must say whether, assuming all that was stated to be accurate, it afforded evidence on which the jury might properly find that the imprisonment was the act of some person acting within the scope of an authority conferred on him by the defendants, they being a railway Company. Up to a certain point there is no doubt about the law. A railway Company, though it be a corporation, is liable in an action for false imprisonment, if that imprisonment be committed by the authority of the Company; and it is not necessary that the authority should be under seal. Both these points were decided by the Court of Exchequer Chamber in *Eastern Counties Railway Company v. Broom*, 6 Exch. 814. But it lies upon the plaintiff to give evidence justifying the jury in finding that the persons actually imprisoning him, or some of them, had authority from the Company to do so. In *Eastern Counties Railway Company v. Broom* the Court of Exchequer Chamber were of opinion that what was stated in the bill of exceptions in that case was not sufficient evidence for that purpose; and it has been argued before us that the evidence in

*679] *the present case goes no further. It has also been argued that, in *Roe v. Birkenhead, Lancashire and Cheshire Junction Railway Company*, 7 Exch. 86, the Court of Exchequer entered a nonsuit in a case in which the evidence, it is said, was similar to that in the present case; and that these decisions, one in a Court of error and the other in a Court of co-ordinate jurisdiction, are binding upon us. But both of these decisions took place in 1851; and in 1853 the

instead of the one issued to himself on the 10th. On finding out his mistake he explained it to the authorities, and requested them to telegraph to the station master at Wood Green, to whom he was known and who also could have ascertained the truth of his assertion; but instead of this course being adopted he was taken into custody and detained nearly six hours, when he was released on his recognisances to appear the next day with the missing ticket, which he accordingly did, and was discharged.

"My client has waited some days to see if the Company would voluntarily make any acknowledgment of their error, and compensation for the injury inflicted; but as he has not received any communication from them he has instructed me to draw your attention to the matter, and to request an answer as to the intention of the Company on the subject.

"I am, Sir,

"Your obedient Servant,

"JAS. M. WRIGHTMAN."

"To the Secretary of The Great Northern Railway Company, King's Cross."

"The Great Northern Railway,
Secretary's Office, King's Cross, London.

"Sir,

"I have your letter of the 30th instant. Any inconvenience Mr. Goff may have suffered on the occasion in question resulted entirely from his own act, and the Company cannot therefore entertain the claim you prefer on his behalf. "I am, Sir,

"Your faithful Servant,

"J. M. WRIGHTMAN, Esq.,"

"HENRY OAKLEY,

"Secretary."

"31st March, 1860.

Court of Exchequer Chamber, in *Giles v. Taff Vale Railway Company*, 2 E. & B. 822 (E. C. L. R. vol. 75), stated principles which are also binding upon us; and which, it was said for the plaintiff, and we think correctly, are applicable to the present case. The question there was, whether there was evidence sufficient to prove a conversion of certain quicks belonging to the plaintiff by the Taff Vale Railway Company, the defendants in that action. The evidence stated in the bill of exceptions showed that the quicks had been brought in two parcels to two different stations belonging to the defendants, and that, when demanded from the clerks there, reference was made to one Fisher, who was called "The General Superintendent of the Line," and he refused to deliver them up. Nothing was stated in the bill of exceptions to show what the authority of a "general superintendent" was. There being no doubt that Fisher was guilty of a conversion, the question was, whether there was sufficient evidence of his authority from the Company to make them liable. Jervis, C. J., Pollock, C. B., Alderson, B., Maule, J., Platt, B., Williams, J., and Talfourd, J., all agreed that there was sufficient evidence. Jervis, C. J., put it on a broad and intelligible principle. He said (a) "I am of opinion that it is the duty of the Company, carrying on a business, to leave upon the spot some one with authority to deal [*680 on behalf of the Company with all cases arising in the course of their traffic as the exigency of the case may demand; and I think that it was a question for the jury, whether Fisher in this case was a person having such authority." Maule, J., puts it on the same ground: (b) "There ought to be some one with authority from the Company to deliver up or refuse to deliver up goods. To whom was the plaintiff to apply, except to the station masters and superintendent? And who else was to have that authority?" Platt, B., uses language still more closely in point on the present case: (c) "It is objected that we do not know what a general superintendent is. But might not the jury know? Might not they rightly infer that he was a person having authority generally to superintend the affairs of the Company on the spot, and, in the course of such superintending, to deliver or refuse to deliver goods left with him as carriers? And then we have the conduct of the parties; the plaintiff, when he wants his goods, goes to the persons acting for the Company; and they all refer him to Fisher as the superior authority. I think that is sufficient evidence to go to the jury." Parke, B., and Martin, B., who, though not dissenting, expressed some doubt, did not at all dissent from the doctrine of the rest of the Court that there was ample evidence that Fisher had authority to bind the Company in all matters requiring a prompt decision, if those matters arose in the course of the ordinary business of the Company. They doubted whether the facts stated on the bill of exceptions showed that *the quicks had so come on the Company's station as to make it an exigency, in the course of [*681 the ordinary business of the Company, to deliver them up or refuse them.

The question in that case arose as to the evidence of authority to deal with goods, and, the language of the different Judges being with

(a) 2 E. & B. 829 (E. C. L. R. vol. 75).

(b) 2 E. & B. 822 (E. C. L. R. vol. 75).

(c) 2 E. & B. 834.

reference to that subject, they speak only of the exigencies of traffic, or of the business of a carrier of goods: but the same principle is, we think, applicable to all exigencies that may be naturally expected to arise in the ordinary course of any of the business of the Company. If these are of such a nature that a decision must be come to on behalf of the Company promptly, the Company may reasonably be expected to authorize some one on the spot to decide for them in such cases. Now, in the present case, the railway Company carry on a business a great part of which consists in carrying passengers for money. By stat. 8 Vict. c. 20, sects. 103, 104, a penalty is imposed on any person travelling on a railway without having paid his fare, with intent to avoid payment thereof; and power is given to all officers and servants on behalf of the Company to apprehend such person until he can conveniently be taken before a justice. In the ordinary course of affairs, the Company must decide whether they will submit to what they believe to be an imposition, or use this summary power for their protection; and as, from the nature of the case, the decision whether a particular passenger shall be arrested or not must be made without delay, and as the case may be not of infrequent occurrence, we think it a reasonable inference that, in the conduct of their business, the Company have on the spot officers with authority to deter-

*682] mine, without the *delay attending on convening the directors, whether the servants of the Company shall, or shall not, on the Company's behalf, apprehend a person accused of this offence. We think that the Company would have a right to blame those officers if they did not, on their behalf, apprehend the person, if it seemed a fit case; and, if so, the Company must be answerable if, in the exercise of their discretion, these officers, on their behalf, apprehend an innocent person. Then, was there evidence that the parties concerned in apprehending the plaintiff, or some one of them, was an officer having such authority from the Company? It is difficult to see why the Company pay the police, if the inspector of their police is not to act for them to this extent: but there is more in this case. We find that the ticket collectors, and the ticket clerk, and the police, and all the persons acting for the Company, go to the office of the superintendent of the line, and refer to him as the superior authority. We agree with Platt, B., in *Giles v. Taff Vale Railway Company*, 2 E. & B. 822, 834 (E. C. L. R. vol. 75), that such conduct is sufficient evidence to go to the jury that the superintendent of the line was the person in authority. The evidence does not show that the concurrence of the secretary was actually obtained; but, if it were, he is but an officer of the same sort of authority as the superintendent of the line. It remains then to see if the two cases relied on by the defendants are so decidedly in point as to prevent our acting upon this evidence. In *Eastern Counties Railway Company v. Broom*, 6 Exch. 314, the question arose on a bill of exceptions. All that is stated on the bill of exceptions is, that the plaintiff was taken out of

*683] a railway carriage and *imprisoned by the defendant Richardson, "then an inspector in the service of the Company, professing to act in so doing as the servant of the Company, and under the assertion by the defendant Richardson of the cause of justification set forth in the defendants' several pleas of justification, but which

several pleas, except the several by-laws therein mentioned, were disproved by the evidence." The pleas set forth as a justification that the plaintiff had infringed various by-laws; that Richardson interfered to enforce them; that in revenge the plaintiff assaulted Richardson, and for that assault was given into custody. It is not at all clear on this statement what the evidence really was, nor whether it brought the case within the principle afterwards laid down in *Giles v. Taff Vale Railway Company*. It is observable that both the argument and the judgment are almost exclusively directed to the question whether there was a justification or not. But, if the decision in *Eastern Counties Railway Company v. Broom* is on a principle inconsistent with that subsequently laid down by the Court of Exchequer Chamber in *Giles v. Taff Vale Railway Company*, we consider ourselves free to choose which of the two authorities we shall follow, and we prefer the latest in date, which we think also the soundest in principle. In *Roe v. Birkenhead, Lancashire and Cheshire Junction Railway Company*, 7 Exch. 36, the facts stated in the report were these. The plaintiff had taken his ticket at a station of the defendants for Bangor and back. The dispute as to his fare arose on the other side of Chester, and off the defendants' line altogether. The plaintiff was taken at the Chester station to a *superintendent. But three Companies occupy the station at Chester, and there [684] was no evidence to show to which Company the superintendent belonged. It seems probable that he would be the superintendent of the line on which the dispute arose, which was not the defendants' line. That superintendent gave the plaintiff in custody to a man called Phillips, and one of the witnesses stated that he believed Phillips to be one of the servants of the defendants' Company. On this state of facts the Court of Exchequer thought there was no evidence that any person concerned in the arrest was a servant of the defendants, except Phillips; and that there was no evidence that he had any authority on their behalf to give passengers into custody. And we agree with them; but the facts are evidently very different from those in the present case. We think, therefore, that there is no ground on which to enter a nonsuit.

The rule was also moved on the ground that the damages, 50*l.*, were excessive. They were liberal, certainly, and we should have been better pleased if they had been smaller; but we do not think the excess so great as to induce us, in our discretion, to order a new trial on that ground. The rule must therefore be discharged.

Rule discharged.

*685]

STEVENS v. AUSTEN.(a) Feb. 7.

S., being seised in fee of a messuage, and having other real and personal estate, died, having devised all his real and the residue of his personal estate to W. S. and H. S., "their heirs, executors and administrators," upon trust that W. S. and H. S., or the survivor of them, or the heirs, executors, or administrators of such survivor, should sell. The testator further declared that W. S. and H. S., or the survivor of them, or the executors or administrators of such survivor, should hold the proceeds of the sale in trust to pay debts and invest all the residue of the trust moneys in government or real securities, and pay the dividends equally between the testator's wife and daughter during their lives, and wholly to the survivor after the decease of one of them; and, after the decease of that survivor, to divide the whole equally amongst all the then living children of the testator, or, failing them, according to the Statute of Distributions. The testator also appointed W. S. and H. S. his executors. They acted in the trust, and H. S., the survivor, devised all his real and personal trust estates to A. and B. (whom he also appointed his executors), to hold to them, their heirs, executors, administrators and assigns, upon the same trusts as the testator H. S. held them. After the death of H. S., A. and B. sold the messuage in question to C., who subsequently contracted with plaintiff to sell it to him in fee.

In an action by plaintiff to recover the deposit money paid under this contract, on the ground that C. had failed to make out a good title, held (*dubitante* Blackburn, J.), that plaintiff was entitled to recover; inasmuch as, by reason of the omission of "assigns" in the description of the donees of the power of sale in the devise by S. creating the trust, the title of the devisees of H. S. to convey to C. was too doubtful for a Court of equity to compel specific performance of the contract.

Quere, per Blackburn, J., whether this Court, as a Court of law, was not bound to decide absolutely whether the vendor's title was good or bad.

S. in 1810 bought the messuage in fee for 462*l*. The price paid to A. and B. by C., upon the sale of it to him in 1855, was only 73*l*. 4*s*., and the contract price between C. and plaintiff, in 1859, was 350*l*.

Held, per totam Curiam, that the inadequacy of the price at which A. and B. sold constituted a breach of trust: and that, as plaintiff, having notice, was affected thereby, plaintiff was entitled on that ground to refuse to complete the contract.

DECLARATION for money had and received.

Plea. Never indebted. Issue thereon.

At the trial before Blackburn, J., at the Sussex Summer Assizes, 1860, it appeared that the action was brought to recover the sum of 50*l*., being the deposit made by the plaintiff with the defendant, an auctioneer and estate agent, upon a contract by the plaintiff with one Samuel Swift, the defendant's employer, to purchase in fee of Swift & *686] certain freehold messuage and premises *situate in the parish of Wadhurst, in the county of Sussex. The contract, which consisted of a written offer by the plaintiff, accepted by Swift, of 350*l*. "for the property, seven acres more or less, at or near Sparrow Green, Wadhurst," was entered into, and the deposit was thereupon made by the plaintiff, in August, 1859. Before action, the plaintiff had repudiated the contract, on the ground of a defect in Swift's title.

The title in question, so far as is material, was as follows. In 1810, another Samuel Swift purchased the premises in fee for 462*l*. By his will, dated 19th June, 1823, after bequeathing some small legacies, he devised the said premises and all other his real estate, and the residue of his personal estate, to his two sons, William Swift and Henry Swift, to hold the same unto the said W. Swift and H. Swift, "their heirs, executors and administrators," upon trust that they, the said W. Swift and H. Swift, or the survivor of them, or the heirs, executors or administrators of such survivor, should, at such time or times as might be considered prudent after the testator's decease, sell

(a) This case has been unavoidably inserted out of its turn.

and dispose of his said real estate, and also such part of the residue of his said personal estate as should be of a saleable nature, either by public auction or private contract, to such person or persons and for such price or prices as the said W. Swift and H. Swift, or the survivor of them, his heirs, executors or administrators, should in their or his discretion think proper. And should, upon payment of the purchase money or purchase moneys for which the said hereditaments and real estate, or any part thereof, should be so sold, convey, surrender and assure the same to the purchaser or purchasers thereof, his, her or their heirs or assigns, or as he, she or they should *direct; and should give one or more receipt or receipts for the said purchase money or purchase moneys; which receipt or [*687 receipts should effectually discharge the purchaser or purchasers from payment of such and so much money as in such receipt or receipts should be expressed or acknowledged to have been received. And the testator ordered, directed and declared that the said W. Swift and H. Swift, or the survivor of them or the executors or administrators of such survivor, should stand possessed of the money to arise by the sale and conversion of his said real and personal estate, upon trust to pay the testator's debts and to invest all the residue of the trust moneys in government or real securities, and to pay the dividends, equally, to the testator's wife and daughter during their joint lives; and after the decease of either of them to pay the whole of such dividends to the survivor; and after the decease of such survivor to call in and divide the principal moneys equally amongst all and every the testator's child or children then living; and, if all such children were then dead, to divide the said principal moneys amongst the testator's next of kin according to the Statute of Distributions. The testator appointed his said trustees his executors. He died in 1824, leaving both real and personal estate. His will was duly proved by the said executors, of whom Henry Swift became acting trustee, always receiving the rents of the real property and dealing with the trust funds. Henry Swift survived his co-executor, William Swift, and, by his last will, dated 15th February, 1853, he devised to James Harmer and John Swift all and singular the real and personal estate whatsoever whereof he should be seised or possessed at the time of his death as a trustee for any person or *per- [*688 sons whatsoever; to hold the same unto the said J. Harmer and J. Swift, their heirs, executors, administrators and assigns, according to the nature of the several estates respectively, upon the same trusts as the testator held the same respectively. He also appointed them his executors. He died in 1854, and his executors, J. Harmer and J. Swift, in March, 1855, conveyed the messuage and premises in question to Samuel Swift, the plaintiff's vendor, in fee. The purchase money paid by Swift was only 78*l.* 4*s.*; but he in the same month of March, 1855, raised a sum of 50*l.* on a mortgage of the premises, and a further sum of 50*l.* in February, 1857.

The following are extracts from the correspondence which took place between Mr. Patten, the plaintiff's solicitor, and Messrs. Cripps and Clarkson, the vendor's solicitors, with reference to the exceptions taken by the former to the title.

"4th April, 1860.

"Dear Sirs,

"Swift and Stevens.

"From the perusal of the abstract and inspection of the deeds comprised in it, it is impossible not to form an opinion that Mr. Samuel Swift, the vendor, gave a very inadequate price for the property he has contracted to sell Mr. Stevens. The sale to him is so recent, and the property is shown to have been, both before and after the sale, of so much greater value than the price given for it, that the purchaser is necessarily put upon inquiry. I beg therefore to know whether you can give any explanation of the circumstances under which the sale to Mr. Smith was made. Irrespective of this objection, it does not appear that the devisees of Henry Swift were duly appointed trustees of the will of Samuel Swift; and even if they *689] were, his devisees and executors had no *authority to execute the trust for sale, not having the legal estate.

"Messrs. Cripps and Clarkson."

"JAMES PATTEN."

"7th April, 1860.

"Dear Sir,

"Swift to Stevens.

"Your first objection appears to us unnecessary to answer. The trustees, Messrs. Harmer and Swift, no doubt obtained the best price they could for the property. Our client had been in possession for many years. Messrs. Harmer & Swift will no doubt be happy to answer any inquiries you may address to them. As to the other objection, we can only rely upon Mr. Francis Turner's opinion, which is set out in the abstract. This opinion appears clear and positive.

"James Patten, Esq.

"CRIPPS and CLARKSON."

"9th April, 1860.

"Dear Sirs,

"Swift to Stevens.

"Notwithstanding your letter, received this morning, treats my first objection so lightly, there can be no doubt that it is a valid one unless Messrs. Harmer and Swift can satisfactorily explain why, so recently as five years since, they sold the property in question for so small a sum as 73*l.* 4*s.*, when it was manifestly worth much more. Without such satisfactory explanation, their having done so must be looked upon as such a palpable breach of duty as affects your client's title. My client has nothing to do with Messrs. Harmer and Swift, and will look to your client alone for the required explanation. As to the other objection, although I have a great respect for Mr. Turner's opinion, yet, as I consider the case submitted to him omitted to call *690] his *attention to what ought to have been stated in it, I cannot consider his opinion satisfactory, much less conclusive.

"Messrs. Cripps & Clarkson."

"JAMES PATTEN."

There was some further correspondence; in which Messrs. Cripps and Clarkson stated, as explaining the inadequacy of the price paid by Samuel Swift for the property, that he was really the person beneficially entitled to it. They, however, offered no proof that such was the fact. Ultimately the plaintiff, through his solicitor, refused to complete the purchase, and, after demanding back his deposit, brought this action. The plaintiff obtained a verdict, leave being reserved to the defendant to move to enter it for him.

Hawkins, in last Michaelmas Term, obtained a rule calling on the

plaintiff to show cause why the verdict should not be entered for the defendant, on the ground that there were no such defects in the vendor's title as entitled the plaintiff to rescind the contract and recover back the deposit.

Tompson Chitty now showed cause.—The plaintiff was entitled to rescind the contract, the vendor's title being defective in two respects. First; the original devise having been to two named trustees, their heirs, executors and administrators, upon trust that they, or the survivor of them, or the heirs, executors, or administrators of such survivor, should sell the property, the survivor of these trustees was unable, by reason of the omission of the word "assigns" in the words creating the trust, to give his devisees the power of sale which he might have exercised himself. Henry Swift's devisees and executors, *therefore, could not make a good title to Samuel Swift, their vendee and the plaintiff's vendor. In *Cooke v. Crawford*, [*691 13 Sim. 91, where an original devise to trustees was in similar terms, omitting the word "assigns," Shadwell, V. C., following his previous decision in *Bradford v. Belfield*, 2 Sim. 264, held that the persons to whom the surviving trustees devised could not execute the trust for sale. In the course of his judgment he says, (a) "My opinion is that it is not beneficial to the testator's estate that he" (the surviving trustee) "should be allowed to dispose of it to whomsoever he may think proper; nor is it lawful for him to make any disposition of it. He ought to permit it to descend; for, in so doing, he acts in accordance with the devise made to him." In *Ashton v. Wood*, 3 Sm. & G. 436, the first devise was to trustees and the survivor of them, and the heirs and assigns of such survivor; yet Stuart, V. C., held that there was sufficient doubt upon the point whether the trust to sell passed by the devise of the survivor, to prevent the Court from forcing the title on a purchaser. In *Sugden on Powers*, ch. 4, s. 1, p. 133 (ed. 8), it is laid down that "A mere power cannot be transferred by the donee by act inter vivos or by will. Where trustees take the legal estate simply upon trust, *e. g.* to sell, the case admits of a different view; although the testator speaks of his trustees, yet, as the legal estate survives, and the trusts bind it, the survivor can execute the trust. But where the trust is limited to the trustee and his heirs, he, of course, cannot constitute another a trustee by conveyance." "Where the trust is reposed in assigns, it has been held and appears now to be settled that the devisees *of the surviving trustee are capable [*692 of executing the trusts. Where the trust was not extended to assigns, the title under a devise of the trustee has in several instances been decided not to be a marketable one." [HILL, J.—*Wilson v. Bennett*, 5 De G. & Sm. 475, is much in point. There, copyhold hereditaments were devised to three trustees, and their heirs, executors and administrators in trust for two tenants for life successively, with a power to the trustees, and the survivors and survivor of them, his heirs, executors or administrators, to sell the same. The survivor of the three trustees devised all estates vested in him as trustee to two trustees, whom he also appointed his executors, of whom one was his customary heir; the two contracted to sell, and the purchaser declined to complete. *Parker*, V. C., held that the title was too doubtful for the

(a) 13 Sim. 97, 98.

Court to compel the purchaser to take it. **BLACKBURN, J.**—A Court of equity will not compel a purchaser to take a doubtful title; but must not we, in a court of law, determine whether the title is legally good or bad? **HILL, J.**—In *Boyman v. Gutch*, 7 Bing. 379 (E. C. L. R. vol. 20), which was an action to recover the deposit on a purchase, **Tindal, C. J.**, in delivering the judgment of the Court of Common Pleas, held that the only question for the Court to consider was, whether the defendant had or had not a legal title to convey to a purchaser. But in *Jeakes v. White*, 6 Exch. 878, which was followed in *Simmons v. Heseltine*, 5 C. B. N. S. 554 (E. C. L. R. vol. 94), it was said by the majority of the Court of Exchequer that, where a question arises at law as to the meaning of a good title, such a title must be understood as a Court of equity would adopt as a sufficient ground for *698] compelling specific performance by a *purchaser.] Secondly, the inadequacy of the purchase money given by the plaintiff's vendor was *prima facie* a breach of trust; by which the plaintiff, having notice of it, would be affected.

Honyman and J. O. Mathew, in support of the rule.—First: in the cases cited on the other side it was not decided that such a title as that in the present case was absolutely bad by reason of the devise, and not the heir, of the surviving trustee having conveyed; but only that a Court of equity would not, in such a state of title, decree specific performance. *Cooke v. Crawford*, 13 Sim. 91, has been much questioned; and the doctrine there laid down ought not to be extended. In *Bradford v. Belfield*, 2 Sim. 264, the original trust was not created by a devise, but by indentures of lease and release, *inter vivos*. In *Ashton v. Wood*, 8 Sm. & G. 486, in which *Stuart, V. C.*, censures *Cooke v. Crawford*, the title was in other respects too doubtful to be forced upon the purchaser. The same may be said of *Wilson v. Bennett*, 5 De G. & Sm. 475. [**WIGHTMAN, J.**—In that case *Parker, V. C.*, says, (a) "There is no doubt that a trustee can devise a trust estate; but the question in every case is, whether the devise is in accordance with the title under which the trustee holds."] Upon the creation of a trust in A. B. and C. D., and the heirs of the survivor, there can be no personal confidence in the heirs of the survivor; for it is uncertain who will be the survivor, and who the heirs of the survivor. In *Titley v. Wolstenholme*, 7 Beav. 425, 434, *Lord Langdale, M. R.*, makes the following observations, which are extremely *694] to the point in the *present case: "When a trust estate is limited to several trustees, and the survivors and survivor of them, and the heirs of the survivor of them, and no power of appointing new trustees is given, we observe a personal confidence given, or at least probably given, to every one of the several trustees. As any one may be the survivor, the whole power will eventually come to that one, and he is intrusted with it, and being so, he is not, without a special power, to assign it to any other; he cannot, of his own authority, during his own life, relieve himself from the duties and responsibilities which he has undertaken. But we cannot assume, that the author of the trust placed any personal confidence in the heir of the survivor; it cannot be known, beforehand, which one of the several trustees may be the survivor; it cannot be known, before-

(a) 5 De G. & Sm. 479.

hand, whether he may have an heir or not, or whether the heir may be one, or may consist of many persons, trustworthy or not, married women, infants, or bankrupts, within or without the jurisdiction. The reasons, therefore, which forbid the surviving trustee from making an assignment *inter vivos*, in such a case, do not seem to apply to an assignment by devise or bequest, which, being made to take effect only after the death of the last surviving trustee, and consequently after the expiration of all personal confidence, may, perhaps not improperly, be considered as made without any violation or breach of trust. It is to take effect only at a time when there must be a substitution or change of trustees:—there must be a devolution or transmission of the estate, to some one or more persons not immediately or directly trusted by the author of the trust:—the estate subject to the trusts must pass either to the *hæres natus* or the *hæres factus* of the surviving trustee; and if the heir or heirs at law, *whatever may be their situation, condition, or number, must be the substituted trustee or trustees, the greatest inconveniences may arise, and there are no means of obviating them other than by application to this Court. With great respect for those who think otherwise, and quite aware that some inconveniences, which can only be obviated in this Court, may arise, from devising trust estates to improper persons, for improper purposes, I cannot, at present, see my way to the conclusion, that in the case contemplated, the surviving trustee commits a breach of trust by not permitting the trust estate to descend, or by devising it to proper persons, on the trusts to which it was subject in the hands of the surviving trustee." [HILL, J.—In that case the word "assigns" was in the devise creating the trust; and Lord Langdale, M. R., goes no further in overruling *Cooke v. Crawford*, 18 Sim. 91, than does Parker, V. C., in *Wilson v. Bennett*, 5 De G. & Sm. 475. If an estate is conveyed to A., his heirs and assigns, in trust that he, his heirs or assigns, shall sell, the words "heirs and assigns" are indefinite words. But in *Cooke v. Crawford*, Shadwell, V. C., said, "There is no case in which a person not mentioned by the party creating the trust has been held entitled to execute it." And Parker, V. C., in *Wilson v. Bennett*, upholds *Cooke v. Crawford* upon that narrow ground.] In *Macdonald v. Walker*, 14 Beav. 556, where the word "assigns" was not in the power of sale, Romilly, M. R., considered *Cooke v. Crawford*, and *Titley v. Wolstenholme*, 7 Beav. 425, conflicting authorities; but, as the word assigns was not in the power, he acted on the principle that the title was too doubtful to induce the *Court to compel a purchaser to take it. In *Hall v. May*, 8 K. & J. 585, where the word "assigns" was in the devise creating the trust, Wood, V. C., declined to extend the doctrine of *Cooke v. Crawford*, and recognised *Titley v. Wolstenholme*. In the present case the devisees were also executors, and the terms of the devise show the testator's intention to have been that the executors should sell the property and apply the proceeds in execution of the trusts. [WIGHTMAN, J.—The testator had personal as well as real estate, and the devise must be construed *reddendo singula singulis*.] Secondly; as to the alleged inadequacy of the consideration given by the plaintiff's vendor for the property, it is not shown that he did not give a fair price for it.

WIGHTMAN, J.—In this case I am of opinion that there are such defects in the title of the vendor as to entitle the plaintiff to rescind the contract and recover back his deposit. Samuel Swift by his will devised his real and personal estate to his two sons, William Swift and Henry Swift, their heirs, executors and administrators, in trust that they, or the survivor of them, or the heirs, executors, or administrators of such survivor, should sell, and apply the proceeds of the sale according to the directions contained in the will. William Swift died, and Henry Swift was the survivor: and Henry Swift by his will devised his trust estates to two persons, neither of whom was his heir, whom he also appointed executors of his will. The question is, whether the persons whom he named devisees of the real estate and *697] *executors of the personal estate of which he was seised or possessed in trust at the time of his death, can make a good title to a purchaser. The word “assigns” being wholly omitted in the will of the first testator, the question is, can the assignee of the surviving trustee under that will make a good title? The case of *Cooke v. Crawford*, 13 Sim. 91, is a direct authority that the devisee of a trustee appointed under such a will as that of Samuel Swift is not a person who can give a good title to a purchaser. That decision has been commented on in many, and questioned in several, subsequent cases. In *Wilson v. Bennett*, 5 De G. & Sm. 475, 479, Parker, V. C., states, as the ground upon which it proceeded, “that a trust cannot be delegated to persons not contemplated in its original creation.” Though the legal estate passes by the devise of the trustee, his devisee has no such power to sell as entitles him to convey. *Wilson v. Bennett* stood upon a different ground, namely, that “the testator did not contemplate such an event as that the estate should vest in one person and the power go to another.” But, though the Vice Chancellor said that the decision in *Cooke v. Crawford* had been understood as going beyond what it really imported, he did not affect to determine that it was not law. In *Ashton v. Wood*, 8 Sm. & G. 436, 446, Stuart, V. C., makes some strong comments on the doctrine of *Cooke v. Crawford*. He says “It was decided upon a very narrow ground—as narrow a ground as could well be taken. It was held that, because the word ‘assigns’ was not used, the trustee for sale, on a devolution of the legal estate, had put it in such a state as that not only the person who *698] had the legal estate could not execute the trust, but that he could devise the trust estate without the power that was annexed to it. Lord St. Leonards, with his great knowledge of the law in such cases, has said that that was an extremely strict construction; and he seems to regret, as I do, that it ever should have been held that a mere legal estate should pass by devise to a man who must hold it in trust for somebody, and yet that the power annexed to the legal estate was one which he could not exercise.” Stuart, V. C., goes on to say that “A different view might have been taken by the Court if the matter had been fully considered upon the principle stated in the case of *Whitfield v. How*, 2 Show. 57.” And after stating the decision in that case, he says “That seems to show that where there is a legal estate with a power annexed to it, and the legal estate is devised, the power should pass with the legal estate to which it is annexed, unless there be something peculiar to evince an intention that

the power was not to be transmissible with the legal estate. But it seems that a contrary doctrine has been established in this Court, on what Lord St. Leonards calls a stream of authority, much too strong for me to resist." I feel myself in the same position as the Vice Chancellor. *Wilson v. Bennett*, 5 De G. & Sm. 475, in which the original devise contained the same limitation as in the will before us, and the devisees in the surviving trustee were also appointed his executors, is also a decisive authority that the executors would not be the proper persons to execute the power of sale. The plaintiff's vendor, therefore, who was the vendee of the two devisees under the will of the survivor of the original trustees appointed by the will *of Samuel Swift, did not establish such a title as the plaintiff was bound to accept. I also think that, on the ground of the total inadequacy of the consideration paid for the estate by the vendor, with notice of which the plaintiff was affected, it would not be safe for the plaintiff to accept the title. [*699

(CROMPTON, J., was absent.)

HILL, J.—I am of the same opinion. I think that the vendor has not made out such a title as the vendee is bound to accept, and that the latter is therefore entitled to rescind the contract and demand back the purchase money. The vendor has failed in two respects. First: he traces his title through the trustees of Samuel Swift's will. Samuel Swift devised to two persons, their heirs, executors and administrators, in trust that they, or the survivor, or the heirs, executors and administrators of the survivor, should sell; the word "assigns" being omitted. The surviving trustee devised this trust estate, and his devisees sold to the plaintiff's vendor. According to the authorities a trust cannot be exercised by a person not contemplated in the original creation of the trust; therefore, the word "assigns" not being in the original devise, the devisee of the surviving trustee has no power to convey the estate. Whether those authorities would be upheld in a Court of error I do not presume to say: it is sufficient for us that the law has been so laid down in a Court of co-ordinate jurisdiction. A second objection to the title of the vendor is, that the devisees under the will of the surviving trustee sold to the vendor for a very inadequate price; and that a purchaser with notice of that fact takes the estate subject to *the trust for the persons beneficially interested. The law with regard to trustees is very strict. [*700 Lord St. Leonards says, in his book on Vendors and Purchasers, ch. 1, sect. 5, p. 50 (18th ed.), "Every trust deed for sale is upon the implied condition that the trustees will use all reasonable diligence to obtain the best price; and that in the execution of the trust they will pay equal and fair attention to the interest of all persons concerned." Either the trustees have not done that in the present case, or, if they have, they have allowed the contrary to appear.

BLACKBURN, J.—I am of opinion that the rule should be discharged. But I wish to say that I am not prepared to agree with my learned Brothers in all respects as to the first ground. The first question appears to me to be whether we are not bound to decide absolutely that the vendor's title is either good or bad; or whether it is enough to say that the title is so doubtful that a Court of equity would not decree specific performance. I used to think that a Court

of law was bound to decide absolutely that the title was good or bad; but in *Jeakes v. White*, 6 Exch. 878, and *Simmons v. Heseltine*, 5 C. B. N. S. 554 (E. C. L. R. vol. 94), though the contrary was not decided, doubt was thrown upon that view. If, therefore, I had only come to the conclusion that the title in the present case was doubtful, I should wish for time to consider whether those two authorities are so strong as to bind us. So, again, if the only objection to the title was grounded on the decision of *Shadwell, V. O.*, in *Cooke v. Crawford*, 13 Sim. 91, I should also wish for time to consider whether we ought to be bound by that case; for although all the subsequent decisions *701] referring to that case say that it is not overruled, they do not altogether confirm it. I do not wish to be considered as expressing an opinion that that decision was wrong: I only desire to pause before acting on it.

The other ground of objection to the title of the vendor is the inadequacy of the consideration given by him on his purchase from the devisees of the surviving trustee, of which the plaintiff had notice. On that ground the title of the vendor is as bad as it well could be.

Rule discharged.

IRISH PEAT COMPANY v. PHILLIPS. Feb. 13.

[Reported in the Queen's Bench and in the Exchequer Chamber on error from that Court, 1 B. & S. 598 (E. C. L. R. vol. 101.)]

ASHWORTH v. STANWIX and WALKER. June 13, 1860; Feb. 23.

The principle that a servant sustaining an injury from the negligence of a fellow servant while engaged in the common employment cannot recover in an action against the common master, does not exempt from liability to action a master who himself takes part in the servant's work, and whilst so doing injures the servant through negligence.

If the master is a member of a partnership by whom the servant is employed, and the work in which he so takes part is within the scope of the common undertaking of the partnership, his copartners are jointly liable with him for the injury thus caused to the servant by his negligence.

DECLARATION: That defendants were possessed of a certain coal *702] pit, wherein there was a shaft; and that plaintiff was lawfully employed in the said pit at the bottom of the said shaft; and in which said pit a certain corf was used by defendants for the purpose of raising coal from the said pit to the mouth of the said shaft; yet defendants so negligently guarded the mouth of the said shaft, and so carelessly used and managed the said corf, and took so little care of a certain plate or rail of defendants at the mouth of the said shaft, that, by reason of the carelessness, &c., of defendants the said plate or rail fell down the said shaft, and struck plaintiff on the head with great force and violence, and fractured his skull; whereby plaintiff became, was and is permanently injured, &c.

Pleas. 1. Not guilty. 2. Not possessed. Issue thereon.

At the trial before Blackburn, J., at the Durham Spring Assizes, 1860, it appeared that the two defendants were lessees of a coal pit and were, in that respect, in partnership together. The plaintiff was

a pitman employed in the pit by them. On the day when the accident happened he was so employed, and the defendant Walker was acting as banksman at the mouth of the shaft. For the purpose of emptying the corves as they came up full of coal from the pit, there was a short tramway made of the usual rails or plates. The banksman's duty was to receive the full corf as it came up, to place it on a tram which travelled upon the tramway, and to hook on the corf which was to go down empty. There was evidence that one of the tramplates was loose, and it appeared that while the defendant Walker was acting as banksman, and after he had been told of the insecure state of this tramplate, it fell down the pit and caused severe injury to the plaintiff, who was standing at the *bottom of the shaft. [*703 The defendant Walker was clearly guilty of negligence; but it was not shown that Stanwix, who was absent at the time of the accident, knew that the tramplate was loose.

The jury found a verdict for the plaintiff as against Walker, and by the direction of the learned Judge a verdict for the defendant Stanwix; leave being reserved to the plaintiff to move to enter a verdict against both defendants.

Manisty had obtained a rule calling on the defendant Stanwix to show cause why a verdict should not be entered for the plaintiff against both the defendants, on the ground that there was evidence to go to the jury upon which they might reasonably have found a verdict for the plaintiff against Stanwix, as well as against Walker.

Overend showed cause.(a)—This is quite a new case; that of a servant suing his masters in respect of an injury caused by the negligence of one of the masters while acting as a servant in working with the plaintiff. In principle, however, the well-settled rule applies that a master is not responsible to a servant for injury caused to him by the negligence of a fellow servant in the course of the common employment. For the purposes of the case the defendant Walker, through whose negligence whilst acting in the capacity of banksman at the pit the accident happened, may be regarded as a fellow servant of the plaintiff; and the other defendant, Stanwix, as the [*704 *master of them both. The plaintiff must be taken to have run the risk, in entering the service, of injury happening to him from the negligence of Walker, whom he must have known to be a person with whom he would have to work. [COCKBURN, C. J.—Can a servant be supposed to contemplate the peculiar risk of an injury caused by the negligence of his master while acting as a fellow servant?] *Roberts v. Smith*, 2 H. & N. 213, shows that personal interference and negligence on the part of a master gives a servant, injured in consequence, a right of action; and in that view Walker may be personally liable as master. His negligence, however, was not such negligence, *quæ* master, as to affect his copartner Stanwix with liability. A master who does not personally interfere is not liable, if he employs competent servants and provides competent machinery for the work: *Bartonshill Coal Company v. Reid*, 8 MoQ. Sc. App. Ca. 266. [BLACKBURN, J.—That was a Scotch appeal; and in Scotland there has been great resistance to the establishment of the rule

(a) Friday, June 15th, 1860. Before Cockburn, C. J., Wightman, J. (who was present during part only of the argument), Crompton and Blackburn, Js.

on this subject, as now settled in England.] In *Southcote v. Stanley*, 1 H. & N. 247, it was held that the defendant, an hotel keeper, was not liable to the plaintiff, who was visiting him, by his request, at the hotel, for an injury sustained by the plaintiff through the falling of a piece of glass upon him from a door which it was necessary to open for the purpose of leaving the hotel, and which was in an insecure condition. The principle of that case is in favour of the defendant *Stanwix*; and *Skipp v. Eastern Counties Railway Company*, 9 Exch. 223, and *Wiggett v. Fox*, 11 Exch. 832, are further authorities in point.

*(WIGHTMAN, J., here left the Court.)

*705] *Manisty and Davison*, contra.—Even if Walker is to be regarded as the servant of *Stanwix*, he was not the less, in conjunction with *Stanwix*, the plaintiff's master; and the cases show that, although a master is not liable to a servant for an injury caused to him by the negligence of a fellow servant, he is liable if he himself interferes personally, and is guilty of negligence conducing to the injury. In the present case, Walker, by his personal negligence, caused the injury to the plaintiff; and Walker's negligence is in law the negligence of *Stanwix* also. But, further, in *Paterson v. Wallace and Company*, 1 McQ. Sc. App. Ca. 748, 751, Lord Cranworth, C., says: "When a master employs a servant in a work of a dangerous character, he is bound to take all reasonable precautions for the safety of that workman. This is the law of England no less than the law of Scotland. It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is staunch and secure when in fact the master knows, or ought to know, that it is not so. And if from any negligence in this respect damage arise, the master is responsible." *Brydon v. Stewart*, 2 McQ. Sc. App. Ca. 80, is to the same effect, and shows that a master who lets a workman down his mine is bound to bring him up safely, even though he come up on his own business, and not on that of his master. In *Bartons-hill Coal Company v. Reid*, 3 McQ. Sc. App. Ca. 266, 288, Lord Cranworth, C., laid down the same principle, as follows: "When a master employs a servant in a work of danger he is bound to exercise due *706] care in order to have his tackle and machinery in a safe and proper condition, so as to protect the servant against unnecessary risks." And in *Bartons-hill Coal Company v. McGuire*, 3 McQ. Sc. App. Ca. 300, 303, Lord Chelmsford expressed his entire concurrence in Lord Cranworth's opinion. Both Walker and *Stanwix*, therefore, were bound to protect the plaintiff from unnecessary risks, the service being dangerous. *Stanwix* delegated this duty to Walker, and Walker, as the evidence shows, grossly neglected it in not taking measures to secure the tramplate which injured the plaintiff, though Walker knew that it was loose. That the negligence of one of several partners while acting for the rest in the partnership business is in law the negligence of all, is shown by *Moreton v. Hordern*, 4 B. & C. 223 (E. C. L. R. vol. 10), where all the proprietors of a stage coach were held responsible for an injury caused to the plaintiff by the negligence of one of them while driving the coach. In the last place, there was no evidence whatever to support the contention on the other side, that Walker was a fellow servant with the plaintiff. *Cur. adv. vult.*

CROMPTON, J., now delivered the judgment of the Court.—The question to be determined in this case is, whether the defendant Stanwix, being co-proprietor with the other defendant, Walker, of a mine, is jointly liable with him for an injury sustained by the plaintiff, a workman in their common employ, through the negligence of the defendant Walker. The facts are such that, if the defendant Walker had been simply the fellow-workman of the plaintiff, the case would have come within the *principle that a servant sustaining injury from the negligence of a fellow servant engaged in [707 the same employment, cannot recover against the common master. The present case would then have been quite analogous to that of *Bartonsbill Coal Company v. Reid*, 3 McQ. Sc. App. Ca. 266. But the present case is distinguishable from the class of cases which have been referred to, in the important particular that the defendant Walker, although in fact engaged jointly with the plaintiff in the work of the mine, was also a co-proprietor, and, as such, one of the plaintiff's masters; and the question is, whether this circumstance takes the case out of the before-mentioned rule, and calls for the application of a different principle. We are of opinion that it does, and that the plaintiff is entitled to hold the defendant Stanwix responsible for the negligence of his co-proprietor and partner. The doctrine that a servant, on entering the service of an employer, takes on himself, as a risk incidental to the service, the chance of injury arising from the negligence of fellow servants engaged in the common employment, has no application in the case of the negligence of an employer. Though the chance of injury from the negligence of fellow servants may be supposed to enter into the calculation of a servant in undertaking the service, it would be too much to say that the risk of danger from the negligence of a master, when engaged with him in their common work, enters in like manner into his speculation. From a master he is entitled to expect the care and attention which the superior position and presumable sense of duty of the latter ought to command. The relation of master and servant does not the less *subsist because, by some arrangement between the joint mas- [708 ters, one of them takes on himself the functions of a workman. It is a fallacy to suppose that on that account the character of master is converted into that of a fellow labourer. Though engaged with the plaintiff in a common employment, Walker did not the less remain the master of the plaintiff, and the partner of the defendant Stanwix. This being so, it follows that Stanwix must be liable in respect of the negligence through which injury has arisen to the plaintiff, as the relation of partner subsisted between Walker and Stanwix; and as the negligence was a matter within the scope of a common undertaking we think that Stanwix is equally liable with Walker. That a partner is liable for the negligence of his copartner when engaged in the business of the partnership is not only clear in principle, but is established by the case of *Moreton v. Hordern*, 4 B. & C. 223 (E. C. L. R. vol. 10), in this Court, where two proprietors of a stage coach were held liable with a third for the negligence of the latter, by whom the coach had been driven. Now it has never been doubted that for personal negligence of the master, whereby injury is occasioned to the servant, the master will be liable. Personal negligence

is clearly established against Walker; and, it being admitted that the defendant Stanwix was his coproprietor and partner, the latter must be held to be jointly responsible in respect of such negligence, and is therefore liable in this action. The rule must be made absolute to enter the verdict against him, as well as the other defendant.

Rule absolute.

*709] ***CASTRIQUE v. BEHRENS and Others.**
June 5, 7, 1860; Feb. 23, 1861.

The principle that in an action for maliciously and without reasonable and probable cause setting the law of this country in motion to the damage of plaintiff, it is essential to show that the proceeding alleged to be instituted maliciously and without reasonable and probable cause has terminated in favour of plaintiff, if from its nature it be capable of such a termination, applies where an action is brought for falsely and fraudulently causing a proceeding to be taken in a foreign Court to the damage of plaintiff. A declaration therefore in such an action, on the face of which it appears that the foreign Court was one of competent jurisdiction in the proceeding, and gave therein a judgment in rem to the damage of the now plaintiff, which judgment remains unreversed; and it does not appear that the now plaintiff, though he was not an original party to the proceeding, might not have intervened, or did not in fact intervene, and obtain a hearing therein; is bad on demurrer.

DECLARATION. For that, before the committing by defendants of the grievance hereinafter mentioned, one John George Claus, of Liverpool, a British subject, was the sole registered owner of a certain ship called *The Ann Martin*, and her appurtenances, which ship was, at the time Claus was her owner, and up to the time of the sale of the said ship hereinafter mentioned, a British ship, and duly registered as such pursuant to the statutes for the time being in force relating to the registering of British vessels; and, on 30th November, 1854, whilst Claus was such owner and so registered, he, by bill of sale duly made and registered pursuant to the said statutes, assigned and transferred by way of mortgage all his estate and interest in the said ship and her appurtenances to one Thomas Harrison, and Harrison became and was registered as the mortgagee of the said ship and her appurtenances, according to the provisions of the said statutes. And on 2d February, 1855, and whilst Harrison was such registered mortgagee, he, by bill of sale duly made and registered pursuant to the said statutes, assigned and transferred *all his interest in the
 *710] said ship and her appurtenances to one Richard Emley, and Emley became and was registered as the mortgagee of the said ship and her appurtenances, according to the provisions of the said statutes. And on 9th April, 1854, and whilst Emley was such registered mortgagee, he, by bill of sale duly made pursuant to the said statutes, assigned and transferred all his interest in the said ship and her appurtenances to plaintiff. And in December, 1853, the said ship sailed from Liverpool on a voyage to Melbourne, in Australia, and from thence back to England, calling at the port of Havre de Grâce, in the French Empire; and one William Benson was, during the said voyage, the master of the said ship; and in the course of the said voyage, at Melbourne aforesaid, Benson drew a certain bill of exchange, dated 8th June, 1854, on Claus, the then owner of the said ship, by the name and designation of *George Claus & Co., Liverpool*,

requiring George Claus & Co., eight days after sight, to pay to the order of certain persons by the name and designation of Messrs. Levien & Steinitz the sum of 601*l.* 16*s.* 6*d.*, for and on account of certain necessary disbursements for the ship called the Ann Martin. And Messrs. Levien & Steinitz, without any value or consideration for such endorsement, or for defendants becoming the holders of the said bill, endorsed the said bill to defendants, then being British subjects residing at Liverpool, in England. And defendants, then being British subjects residing in England, being the holders of the said bill, the said bill was duly presented for acceptance to G. Claus & Co., and was dishonoured. And defendants, well knowing the premises, and that the said ship was about to call, on her said voyage from Melbourne to England, at the port of *Havre de Grâce, in the empire of France; and well knowing, as the fact is, that by the law of France when, during a voyage, a bill of exchange is drawn by the master of a ship upon the owner of such ship for and on account of necessary disbursements for the ship, a French subject, if he be the bonâ fide holder for value of such bill, but not otherwise, may, if the ship be in any port of the empire of France, take proceedings in rem in the Courts of the said empire to attach the ship in such port, and to sell and dispose of such ship for the purpose of paying such bill and the costs of such proceedings; afterwards and after Claus had ceased to be the owner of and plaintiff had become and was interested in, the said ship as aforesaid, and after the said bill had been dishonoured, falsely, fraudulently and unlawfully contriving and intending to deprive plaintiff of his property and interest in the said ship, and to cause the said ship to be sold for payment of the said bill of exchange, fraudulently and unlawfully conspired with one Etienne Troteaux, then being a French subject residing in France, that defendants should endorse the said bill to Troteaux without any value or consideration for such endorsement, and that Troteaux should take proceedings in the Tribunal of Commerce at Havre, and also in the Civil Tribunal at Havre, to attach the said ship and her appurtenances at the said port, and to obtain a sale of the same for the purpose of paying the said bill out of the proceeds of such attachment and sale; and that for that purpose Troteaux should falsely and fraudulently represent to the said Tribunal of Commerce and to the said Civil Tribunal at Havre, that he, Troteaux, then was the bonâ fide holder of the said bill for good and valuable consideration, in order thereby *falsely and fraudulently to obtain an order of the said Tribunals for the attachment and sale of the said ship for the purpose of paying the said bill of exchange. And afterwards, and after the said bill had become due and had been dishonoured, defendants, in pursuance of the said conspiracy, did endorse the said bill to Troteaux, without any value or consideration for such endorsement. And thereupon Troteaux, upon the arrival of the said ship at the port of Havre, took proceedings in the said Tribunal of Commerce and also in the said Civil Tribunal at Havre, to attach the said ship and to obtain a sale of the same for the purpose of paying the said bill out of the proceeds of such sale; and did falsely and fraudulently represent to the said Tribunals respectively that he was the bonâ fide holder of the said bill for good and valuable consideration; and thereby obtained

from the said Tribunals orders for the attachment and sale of the said ship, for the purpose of paying the amount of the said bill and the costs of such proceedings. And thereby plaintiff wholly lost and has been deprived of his property and interest in the said ship and her appurtenances.

Demurrer. Joinder in demurrer.(a)

Holl, for the plaintiff.(b)—The declaration discloses a good cause of action. The gist of it is that it charges the defendants with a conspiracy to deprive the plaintiff of his property in the ship *Ann Martin* by a fraudulent endorsement of the bill of exchange to *Troteaux*, with intent that he should falsely represent himself as a bona fide holder for value, and so attach the ship under the French law. *Coxe v. Smithe*, 1 Lev. 119, is a case in point. There it was held that an action lay for causing the plaintiff to be deprived of his office by means of a false affidavit of malfeasance by him therein. In *Fitzherbert De Nat. Brev.* 116 D., it is laid down that "Conspiracy shall be maintainable against those who conspire to forge false deeds which are given in evidence, by which any person's land is lost." *Gerhard v. Bates*, 2 E. & B. 476 (E. C. L. R. vol. 75), shows that there is no necessity for any privity between the parties to support an action of tort for a false representation. In principle, therefore, it is immaterial, with regard to such an action as the present, whether the false representation was made to the plaintiff himself, or to some other person who had power to deprive him of his property. *Gregory v. Duke of Brunswick*, 6 M. & G. 205 (E. C. L. R. vol. 46), shows that an action lies for a conspiracy to hiss an actor off the stage; so that acts, innocent in themselves, if done for a wrongful purpose, are actionable.

Hence, in the present case, the defendants' fraudulent intent in endorsing the bill to *Troteaux*, makes them liable to the plaintiff. It will be said, on the other side, that the action is, in effect, for the abuse of the process of a foreign Court. But first, the gist of the action is the conspiracy in this country to deprive the plaintiff of his property by means of the overt acts of endorsing the bill to a French subject and of the false representation by that person to the French Court that he was an endorsee for value. And, secondly, an action lies for falsely and maliciously abusing the process of any Court. *Grainger v. Hill*, 4 B. N. C. 212 (E. C. L. R. vol. 33); *Heywood v. Collinge*, 9 A. & E. 268 (E. C. L. R. vol. 36); *Whitelegg v. Richards*, 2 B. & C. 45 (E. C. L. R. vol. 9); *Daniels v. Fielding*, 16 M. & W. 200; *Farley v. Danks*, 4 E. & B. 493 (E. C. L. R. vol. 82); are instances of actions for such an abuse of the process of Courts in this country. A fortiori ought such actions to lie, in our Courts, for an abuse of the process of a foreign Court, lest the person injured thereby should be without redress in the country where the wrong is committed. The other side may rely upon a class of cases which decide that a false statement made in the course of a trial is not the subject of an action; but the present case differs from them in this: that here the process of the Court was set in motion by the false state-

(a) There were also demurrers by the plaintiff to two of the pleas, and a demurrer by the defendants to the replication; but these pleadings and the arguments upon them are omitted, as it became unnecessary for the Court to give an opinion upon their validity.

(b) Tuesday, June 5th, 1860. Before Cockburn, C. J., Wightman, Crompton and Blackburn, Js.

ment and conspiracy. In 12 Rep. 128, tit. *False Affidavits*, it is laid down that one may have an action against another to recover damages for perjury by which damages accrue: and in *Revis v. Smith*, 18 C. B. 126, 142 (E. C. L. R. vol. 86), Willes, J., seems to have been of opinion that an action may be brought in respect of any damage which the plaintiff has sustained, or which has been brought about, by means of an affidavit made by the defendant, causing the plaintiff to be harassed by illegal proceedings. [CROMPTON, J.—It appears from the declaration that the French Courts gave judgment in favour of the Troteaux. Was not that a judgment in rem, and, as such, binding, till reversed, on all the world, and, therefore, on the plaintiff?] The Court of Common Pleas has held that this very judgment was not a judgment in rem.(a) But even if they were wrong in so holding, a judgment *in rem may be avoided, if fraudulently obtained. [*715 De Grey, C. J., in delivering the opinion of the Judges in *Duchess of Kingston's Case*, 2 Sm. L. C. 650 (ed. 5), says "Like all other acts of the highest judicial authority, it" (the sentence of the Spiritual Court) "is impeachable from without: although it is not permitted to show that the Court was mistaken, it may be shown that they were misled. Fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings of Courts of justice. Lord Coke says, it avoids all judicial acts, ecclesiastical or temporal." Mr. Smith, in his notes to that case, commenting upon the extent to which a foreign judgment is to be held binding here, observes:(b) "It is" "not too much to say, that our Courts would allow" it "to be impeached by extrinsic evidence, showing distinctly that the Court which pronounced it had no jurisdiction," "or that it was obtained by fraud, for that, to use the language of the Lord Chief Justice, is an extrinsic collateral act, which vitiates the most solemn proceedings even of our own Courts." The plaintiff having been no party to the proceedings in the French Courts, and having had no opportunity of intervening, the judgment, even if it be in rem, is not binding on him, having been obtained by fraud. Even in an action for a malicious prosecution, the rule that the plaintiff is bound to show a termination in his favour of the proceeding of which he complains, does not apply where those proceedings are ex parte, and must of necessity terminate unfavourably to him: *Steward v. Gromett*, 7 C. B. N. S. 191 (E. C. L. R. vol. 97). In *Story's Conflict of Laws*, sect. 592, cap. 15, p. 986 (ed. 3), it is laid down that a judgment in rem against *movable property [*716 within the jurisdiction of the Court pronouncing the judgment, and exercising a jurisdiction in rem, is conclusive. But the author adds that "The doctrine" "is always to be understood with this limitation, that the judgment has been obtained *bonâ fide* and without fraud; for if fraud has intervened, it will doubtless avoid the force and validity of the sentence." [WIGHTMAN, J.—In *Smith v. Tonstall*, Carth. 8, an action was held to lie against the defendant for conspiring with one W. S. to procure the latter to confess a judgment to a person to whom he owed nothing, in order to defeat an execution by the

(a) In *Castrique v. Imrie*, 8 C. B. N. S. 1 (E. C. L. R. vol. 98). That decision has, however, been reversed on appeal by the Exchequer Chamber. *Imrie v. Castrique*, 8 C. B. N. S. 405.

(b) 2 Sm. L. C. 684 (ed. 5).

plaintiff against W. S. for rent arrear: and the decision was affirmed on error to Parliament. CROMPTON, J.—There the judgment confessed was not a judgment in rem. WIGHTMAN, J., referred to Savill v. Roberts, Salk. 13.] The rule that the proceedings complained of must be shown to have terminated favourably to the party complaining of them, if it is to be extended beyond the case of an action for malicious prosecution, can apply only where the parties are the same, and the proceedings are not ex parte; its only object being to avoid the existence at the same time of incongruous judgments between the same parties in a matter twice litigated between them.

Montague Smith, for the defendants.—It appears from the declaration that the proceedings in the French Court were in rem; and it must be assumed, until the contrary is shown, that all the proper parties had notice of them; for it cannot be supposed that the Court would act in a manner contrary to natural justice. The presumption *717] **omnia rite esse acta* applies; if there was any irregularity, it lies upon the plaintiff to aver it, and to show some ground for impeaching the judgment. [BLACKBURN, J.—It may not be necessary for the plaintiff to impeach the judgment. He may say that he has a good cause of action against the defendants for wrongfully and improperly doing that which has resulted in a valid judgment in rem to his detriment.] If the judgment is valid, the plaintiff can have no cause of action until it is reversed; his proper course was to appeal against it in the regular course of procedure of the Courts in which the proceedings were brought. The leading authority that a judgment in rem is, while it stands, conclusive on all the world, is *Hughes v. Cornelius*, 2 Show. 282, in which the judgment of a foreign Admiralty Court adjudging a ship lawful prize was held conclusive; and, though erroneous in fact, binding on the owner, so as to prevent him, while it remained unreversed, from recovering the ship in this country. In *Vanderbergh v. Blake*, Hardr. 194, 195, which was an action for falsely and maliciously procuring a sentence of forfeiture of the plaintiffs' goods as being the goods of aliens, whereas the defendant knew the plaintiffs to be the owners of the goods and to be denizens, Lord Hale, C. B., made some observations very much in point in the present case. He said: "It deserves consideration whether an action lies at all, as this case is, or not: for here the goods are condemned as forfeited by judgment of the Court: and the party might have prevented that by coming in before judgment upon proclamation and claiming property; and if such an action should be allowed, the judgment *718] would *be blowed off by a side wind: and so in other actions; as if a man be convicted of perjury, an action upon the case lies not, though the prosecution were malicious. It has been a great doubt in this Court whether an action of trover lies after such a condemnation, and adjudged at last that it does not. But if a particular person had come in, and claimed property, and lost them, yet the true proprietor might have an action of trover, because he was no party to the former suit; but here upon a condemnation after proclamation, it is otherwise." In *Whitworth v. Hall*, 2 B. & Ad. 695 (E. C. L. R. vol. 22), it was held that, in an action for maliciously suing out a commission of bankruptcy against the plaintiff, it must be averred and proved that the commission was superseded before the

commencement of the action : and that, if this fact be not proved, the plaintiff ought to be nonsuited, though the fact be not averred in the declaration, and though the defendant, who might have demurred for the omission, has not done so ; Lord Tenterden, C. J., in giving judgment, saying : " If a commission of bankrupt be sued out without any reasonable or probable cause, we must assume that the Lord Chancellor would supersede it." In *Steward v. Gromett*, 7 C. B. N. S. 191 (E. C. L. R. vol. 97), the Court affirmed the general rule that the plaintiff must show a termination in his favour of the proceedings the institution of which is his ground of complaint ; but considered the particular instance an exception. In *Farley v. Danks*, 4 E. & B. 493 (E. C. L. R. vol. 82), which was an action for falsely and maliciously procuring the plaintiff to be adjudged a bankrupt, the adjudication was annulled before action brought. *Revis v. Smith*, 18 C. B. 126 (E. C. L. R. vol. 86), in no way supports the plaintiff's contention. **Collins v. Cave*, 4 H. & N. 225, shows that it is not [*719 actionable to have fraudulently induced a third person to bring a wrongful action against the plaintiff ; at all events, if it appears that that action terminated unfavourably to him. So, *Cotterel v. Jones*, 11 C. B. 718 (E. C. L. R. vol. 73), decides that no action lies for a conspiracy falsely and maliciously and without any reasonable or probable cause to commence and prosecute an action, in the name of a third person, against the plaintiff, without an allegation showing that legal damage has been sustained thereby. *Haddan v. Lott*, 15 C. B. 411 (E. C. L. R. vol. 80), is a further authority that special damage, the immediate result of the wrong complained of, must be averred in a declaration for falsely, maliciously and without reasonable and probable cause, procuring a third person to do the plaintiff an injury. The instances given in Com. Dig. *Action upon the Case for Conspiracy* (A) ; *Action upon the Case for a Deceit* (A 4) ; *Fitzherbert De Nat. Brev. tit. Writ of Conspiracy*, 116 E. ; show that a plaintiff who complains that he has been injured by a conspiracy to set the law in motion against him must show either that the proceedings of which he complains were set aside before writ brought, or that they terminated in his favour. In the last case bearing on the subject, *Barber v. Lesiter*, 7 C. B. N. S. 175, 187 (E. C. L. R. vol. 97), Erle, C. J., says : " The declaration is partly for conspiracy and partly for overt acts, amongst which there might possibly be some which might indirectly have led to the charge against the plaintiff. If the declaration did amount to a charge that the defendant did some act which directly caused the plaintiff to be prosecuted for illicit distillation, *it would fall within the rule applicable to malicious [*720 prosecutions, as charging that the defendant and Savage used the excise officer as an instrument in their hands for the prosecution they planned ; and then, the plaintiff having been convicted, he could not maintain the action."

Holl, in reply.—A judgment in rem is conclusive as an estoppel only on the point adjudicated upon. In the present case, therefore, the judgment of the French Court is conclusive only as to the status of the ship, but is no bar to this action. In 2 *Taylor on Evidence*, § 1490, the author says : " Though a judgment in rem is " binding upon all the world as to the precise point directly decided, and con-

sequently the decision cannot be impeached in the same or another Court, by showing that the facts on which it immediately rests are false;—yet, when these facts are themselves put directly in issue in a subsequent suit, the judgment does not” “furnish conclusive evidence of their truth, however necessary it may have been for the Court proceeding in rem, to have determined that question before it adjudicated upon the principal point.” *Dalgleish v. Hodgson*, 7 Bing. 495 (E. C. L. R. vol. 20), and *Fisher v. Ogle*, 1 Campb. 418, show that the ground upon which a foreign judgment in rem proceeded may be contested in an English Court of law, if that ground does not appear clearly on the face of the judgment. The authorities already cited show, further, that a judgment in rem may be impeached, if it be obtained by fraud. In *Cotterell v. Jones*, 11 C. B. 713 (E. C. L. R. vol. 73), and *Haddon v. Lott*, 15 C. B. 411 (E. C. L. R. vol. 80), the *721] actions failed, *because it was not sufficiently alleged that the plaintiffs had sustained legal damage; and *Collins v. Cave*, 4 H. & N. 225, was decided mainly on the ground that the damage sustained was too remote a consequence of the defendant's wrongful act.

Cur. adv. vult.

CROMPTON, J., now delivered the judgment of the Court.—In this case the demurrer to the declaration raises a question of some difficulty. There is no doubt, on principle and on the authorities, that an action lies for maliciously and without reasonable and probable cause setting the law of this country in motion to the damage of the plaintiff, though not for a mere conspiracy to do so without actual legal damage; *Cotterell v. Jones*, 11 C. B. 713 (E. C. L. R. vol. 73); *Barber v. Lesiter*, 7 C. B. N. S. 175 (E. C. L. R. vol. 97). But in such an action it is essential to show that the proceeding alleged to be instituted maliciously and without probable cause has terminated in favour of the plaintiff, if, from its nature, it be capable of such a termination. The reason seems to be that if, in the proceeding complained of, the decision was against the plaintiff and was still unreversed, it would not be consistent with the principle on which law is administered for another Court, not being a Court of appeal, to hold that the decision was come to without reasonable and probable cause. In the present case the proceedings were not instituted in the Courts of this country, but they are stated to be proceedings in rem in the Courts of France. There is no direct authority on the point; but it *722] seems to us that the same principle *which makes it objectionable to entertain a suit grounded on the assumption that the unreversed decision of a Court in this country was come to without reasonable and probable cause, applies where the judgment, though in a foreign country, is one of a Court of competent jurisdiction, and come to under such circumstances as to be binding in this country. A judgment in rem is, as a general rule, conclusive everywhere, and on every one; and we do not think that the averments in the declaration show that this judgment in rem was obtained under such circumstances as to be impeachable by the present plaintiff. It is averred, and we must on the demurrer assume that it is truly averred, that by the law of France the judgment in rem can only be obtained if the holder of the bill of exchange be a French subject, and *bons fide* holds for value; and we must take it as admitted on this

demurrer that Troteaux, the French holder of the bill of exchange, by the fraudulent procurement of the defendants falsely represented to the French Court that he was holder for value, when he was not. It is not necessary to say what would be the effect if it were stated that, by the contrivance of the defendants, the proceeding were such that the plaintiff had no opportunity to appear in the French Court and dispute the allegations. In the present case it is quite consistent with the averments in the declaration that the plaintiff had notice of the proceedings in France and purposely allowed judgment to go by default, or even that he appeared in the French Court, intervened, and was heard, and that the very question whether Troteaux was a holder for value was there decided against him. We think, on the principle laid down in **Bank of Australasia v. Nias*, 16 Q. B. 717 (E. C. L. R. vol. 71), that the plaintiff cannot impeach the judgment here on such grounds, and that whilst it stands unreversed this action cannot be maintained. The declaration being thus, in our opinion, bad, and the defendants therefore entitled to our judgment, it is unnecessary to consider the sufficiency of the pleas.

Judgment for the defendants.

MEMORANDA.

In this Vacation a patent of precedence was granted to George Hayes, Serjeant at law, to have place and precedence at the Bar, next after Archibald John Stephens, Esq., one of her Majesty's Counsel.

In the same Vacation the following gentlemen were appointed Queen's Counsel.

William Dugmore, Esq., of Lincoln's Inn.

William Anthony Collins, Esq., of Lincoln's Inn.

Anthony Cleasby, Esq., of the Inner Temple.

Henry Warwick Cole, Esq., of the Inner Temple.

John Fraser Macqueen, Esq., of Lincoln's Inn.

Thomas Chambers, Esq., of the Middle Temple.

Edwin Plumer Price, Esq., of the Inner Temple.

Josiah William Smith, Esq., of Lincoln's Inn.

Richard Baggallay, Esq., of Lincoln's Inn.

Henry Mills, Esq., of the Middle Temple.

The Hon. Adolphus Frederick Octavius Liddell, of the Inner Temple.

*724] *William Baliol Brett, Esq., of Lincoln's Inn.

John Burgess Karslake, Esq., of the Middle Temple.

William Digby Seymour, Esq., of the Middle Temple.

John Duke Coleridge, Esq., of the Middle Temple.

The Hon. George Denman, of Lincoln's Inn.

George Mellish, Esq., of the Inner Temple.

And Thomas Wheeler, Esq., of the Middle Temple, was called to the degree of the coif. He gave rings with the motto "Non sine labore."

END OF HILARY VACATION.

ADDITIONAL CASES

FROM

CONTEMPORANEOUS REPORTS.

IN THE HOUSE OF LORDS.(a)

WILLIAM SEED, Appellant. JOHN HIGGINS and Others,
Respondents. *May 4, 5, July 19, 1860.*

Where the question of novelty or infringement depends merely on the construction of the specification, it is one entirely for the Judge, but where it also depends on other circumstances, such as the degree of difference, or of similitude between two machines, it is a mixed question of law and fact: what the jurymen find to have been done is the matter of fact; but the Judge must apply that fact according to the rules of law, and is entitled and bound to say whether what has been done amounts to an infringement.

The plaintiff took out a patent for an improvement in machinery used for roving cotton. His specification appeared to claim the discovery of the application of the principle of centrifugal force for such a purpose, but he filed a disclaimer, declaring that he intended to claim only the application of centrifugal force in the particular manner described in the specification:

Held, that taking these two instruments together (*dub.* Lord Wensleydale), they sustained the patent.

The particular manner described was by the use of "a weight." The defendants employed a machine similar in many respects, but, though using weight, or pressure occasioned by weight, as a force, not using "a weight":

Held, that this did not amount to an infringement of the plaintiff's patent; and that the Judge, on seeing this distinction, ought (*dub.* Lord Campbell, C.) so to have directed the jury.

On a trial for the infringement of a patent, the Judge declared his opinion that the specification and disclaimer were sufficient to sustain the patent, but he reserved that question for the Court. A verdict was given for the plaintiff. A rule to enter the verdict for the defendants was obtained, but was discharged. Leave to appeal was granted under the 17 & 18 Vict. c. 125, and the Court added to the leave, "and also on the ground that taking the specification and disclaimer to be good, there was no evidence to go to the jury of infringement." This second point had not been discussed in the Court below. The Court of Exchequer Chamber affirmed the judgment of the Court below on the question of the sufficiency of the specification and disclaimer, but directed a new trial, on the ground that there was no evidence of infringement to go to the jury:

Held, that the Court of Exchequer Chamber had authority to grant a new trial.

The opinion of scientific witnesses as to whether there has or not been an infringement ought not to be received (*per* Lord Wensleydale).

THIS was an action brought by Seed to recover damages for the infringement of a patent, granted to him on the 14th July, 1846, for

the invention of "certain improvements in machinery, or apparatus for preparing, slubbing, and roving cotton, and other fibrous substances," which machinery he charged the defendant with having imitated. On the 23d August, 1854, the plaintiff filed a disclaimer, and the declaration alleged a breach of the patent right after that time.

The defendants pleaded, first, not guilty; secondly, that the plaintiff was not the inventor; thirdly, that the invention was not new; fourthly, that the invention was not a manufacture; fifthly, that the specification was insufficient; sixthly, that the disclaimer extended the right originally claimed; seventhly, that the invention described in the altered specification was a different invention from that for which the patent was granted.

Issue was taken on all these pleas.

The important words in the first specification filed by the plaintiff were these: "My improvements in machinery or apparatus for preparing, slubbing, and roving cotton, and other fibrous substances, apply solely to that part of such machinery called the flyer, which is employed, in connection with the spindle, for the purpose of winding the sliver or roving upon the bobbin. My invention consists in the application of the principle of centrifugal force to the flyers employed in the above-mentioned machinery, for the purpose of producing the required elasticity or pressure upon the bobbin, by causing the small spur or lever, which conducts the sliver of cotton or other fibrous material on to the bobbin, to press or bear against the same simply by the action of such force, instead of being affected by springs or such other mechanical pressure. By the application of this invention the bobbins of rovings will not only be made hard, but equally compressed throughout, as the pressure upon the same will be found to decrease slightly as the diameter of the bobbin increases, and thus equalize the formation thereof, instead of having the outer or finished diameter made harder than the interior, which has hitherto been the case." The specification went on to describe the apparatus, and said that the upper end of the hollow flyer leg "has a small weight, *h*, attached thereto. As the flyer, *c c*, revolves at a high velocity, the weight *h*, at the upper end of the wire, will be thrown from the centre, and cause the spur or lever, *e*, at the lower end of the wire, to bear or press against the bobbin, *b b*, the pressure slightly decreasing as the increasing diameter of the bobbins causes the weight, *h*, to approach the centre of rotation." A drawing was attached to this description. The specification concluded thus: "The above apparatus represents one particular and practicable mode of applying my invention; but I would here remark, that I do not intend to confine myself to this particular method; but I claim as my invention the application of the law or principle of centrifugal force to the particular or special purpose above set forth, that is, to flyers used," &c., as before described.

The plaintiff afterwards, under the 5 & 6 Will. 4, c. 83, and 15 & 16 Vict. c. 83, put in a disclaimer, which thus recites the reason for making it: "Whereas I have been advised that the claim of my invention, contained in the said specification, may be construed in such a manner as to be more extensive than I intended, and by reason thereof I am desirous of making and extending the disclaimer hereinafter expressed," &c. It then proceeded: "I disclaim all application

of the law or principle of centrifugal force as being part of my said invention, or as being comprised in my claim of invention contained in the said specification, except only the application of centrifugal force *by means of a weight acting upon a presser*, so as to cause it to press against a bobbin, as described in the said specification; and I declare that the above-written disclaimer is not intended to extend the exclusive right granted by the said letters patent, and shall not extend the said right in any way whatever."

The cause was tried before Lord Campbell, at the sittings after Trinity Term, 1857, when evidence was given to show that the object of the plaintiff's invention was to produce a close and even winding of cotton on a bobbin, and that this was effected by a continuing pressure on the whole side of the bobbin, while the winding was going on. Among the witnesses called for the plaintiff were the following:—Mr. Carpmael, after describing the two machines, said, "The similarity between that and Mr. Seed's is, that the weight is carried up the leg of the flyer; but the defendants do not carry the mean of the weight at the top; they make theirs weighty all the way up. Mr. Seed does not distribute his weight, but carries it to the top; the defendants carry it only part to the top, and distribute it all the way. I think that is not any substantial difference. It has the essential feature of Mr. Seed's, in carrying the weight from the bottom of the leg up the leg, and preventing the large excess of weight at the end of the leg which previously existed."

Mr. Charles May said: "The distinctive property of the plaintiff's presser consists in the application of the centrifugal tendency of the weight, that weight being supported at a higher point than the plane of rotation of the pressing finger. The defendants' presser so far resembles the plaintiff's in the peculiar distinctive quality of bringing the weight nearer to the source of motion; by bringing it higher up the leg there is less tendency to create that vibration which I believe was fatal to Dyer's presser. It gives the peculiar advantages of the plaintiff's in a great measure." In cross-examination he said that the weight in the defendants' machine was on the leg of the flyer; in the plaintiff's it was upon a separate piece of machinery—upon a separate axis.

At the close of the plaintiff's case it was objected, first, that the disclaimer did, in fact, extend the claim, and described and claimed an invention different from that for which the patent had been granted; secondly, that if the invention described in the specification, as altered by the disclaimer, was limited to the particular mode of applying centrifugal force described in the disclaimer, specification, and drawings, there was no evidence of any infringement. These objections were overruled; but the point raised by the first was reserved. The second was not reserved, and the question of infringement was left to the jury. A verdict was found for the plaintiff.

In Michaelmas Term, 1857, a rule was obtained to enter judgment for the defendants, on the ground that the disclaimer described a different invention than that for which the patent was granted, and that if the invention was confined to the particular mode of applying centrifugal force described in the specification, there was no evidence

of infringement. In Hilary Term, 1858, this rule was discharged.^(a) The case was taken by appeal to the Exchequer Chamber, upon leave granted by the Court of Queen's Bench, under the 17 & 18 Vict. c. 125. The rule granted the leave, not only on the ground reserved at the trial, as to the construction of the specification and disclaimer, but "also on the ground that, taking the specification and disclaimer to be good, for the reasons mentioned in the judgment of the Court, there was no evidence to go to the jury of infringement." The patent was there held valid, but the majority of the judges thinking that there was no evidence of infringement, a new trial was ordered.^(b) Both parties appealed; the plaintiff, because he contended that the Exchequer Chamber had no authority to order a new trial on this new ground of misdirection; the defendants, because they insisted that the patent was not valid.

The *Solicitor-General* (Sir W. Atherton) and Mr. M. Smith (Mr. *Hindmarch* was with them), for the appellant, Seed.—There was no jurisdiction in the Court of Exchequer Chamber to direct a new trial in this case. The leave granted under the 17 & 18 Vict. c. 125, ss. 33, 34, 35, could give no such authority. There can only be an appeal against what was decided in the Court below. The first rule was to enter a verdict for the defendants. That rule was discharged. The Exchequer Chamber, on appeal, confirmed that discharge, but discussed a new matter, and ordered a new trial upon it. This was not exercising an appellate, but an original jurisdiction; and there is nothing to warrant such a proceeding; and the power of appealing being a statutory power, it must be strictly followed.

The original specification and the patent must be taken together, and they sufficiently set forth the nature of the invention, and the mode to carry it into effect, and constitute a good ground for a patent. The disclaimer does not claim anything not claimed in the specification, but, on the contrary, limits what might have appeared to be a claim for every application of centrifugal force to a claim for the application of it in the manner, and for the purpose, described in the specification.

Assuming that the direction as to infringement may now be discussed, it is submitted that the question of infringement was properly left to the jury. That question depends on the testimony of witnesses, and not on the construction of instruments, and is a question for the jury, and not for the Judge: *Jupe v. Pratt*, Webst. Pat. Cas. 144; *De la Rue v. Dickenson*, 7 E. & B. 738 (E. C. L. R. vol. 90): so it was treated in *Bovill v. Keyworth*, Id. 725, and in *Lister v. Leather*, 8 E. & B. 1004 (E. C. L. R. vol. 92). A patent for a combination does not import that each of the parts is new, nay, it is sufficient if the combination is new, though each of the parts may be old. Whether the combination is new is a question for the jury. In *Steiner v. Heald*, 6 Exch. 607, though the obtaining of a colouring matter from madder was known almost as widely, perhaps, as the principle of centrifugal force, still the first application of a known process, the use of hot water with an acid, to a known material, spent madder, to produce what had never before been obtained in the same way, was left to the

(a) 8 E. & B. 755 (E. C. L. R. vol. 92).

(b) 8 E. & B. 771.

jury as sufficient to sustain a patent. *Hills v. The London Gas Company*, 5 H. & N. 812, is an authority as to both these propositions.

The Lord Chancellor intimated that the respondents' counsel need not trouble themselves on the question respecting the jurisdiction of the Court in this case to direct the new trial.

Mr. *Knowles* and Mr. *Grove* (Mr. *Webster* was with them), for the respondents.—The specification and disclaimer will not support this patent. The specification was too wide. When the plaintiff framed it, he was plainly not aware that the principle of centrifugal force had ever before been applied to such a purpose. Yet it had been applied in *Dyer's* patent. A patentee must sum up in his specification the principle of his invention; if that principle is not new, the patent cannot be supported, although it appears that the application of the principle as described in the specification is new: *The King v. Cutler*, 1 Stark. 854 (E. C. L. R. vol. 2); for he must accurately describe his invention, so that men may know both what to do and what to avoid.

[The LORD CHANCELLOR.—If there was a proper disclaimer of what he had no right to, would not the rest be valid?]

It might not, if the original specification had claimed as an invention a principle perfectly well known to every one; for then, the original being wholly void, no mere amendment, which a disclaimer is, could cure its defects.

Then, was the Court of Exchequer Chamber right in saying that there was evidence to go to the jury? To be able properly to answer that question, *Dyer's* patent ought to be here.

[The LORD CHANCELLOR.—Is that part of the materials laid before the Court of Appeal? If not, it cannot be referred to.]

It is not part of the printed case, but it formed part of the evidence, for the witnesses referred to it, and made comparison with it, and that evidence is before the House.

[The LORD CHANCELLOR.—*Dyer's* patent was only referred to with regard to novelty, but not with regard to infringement.]

But the two things are so blended together that it is impossible to separate them. *Dyer's* patent was gone, but if that patent contained what the plaintiff claimed as his invention, the use of the machinery in *Dyer's* patent could not be an infringement of the plaintiff's patent, for he could have no exclusive right in what was previously well known. A similar process applied to a purpose different from that which is the object of the patent will not constitute an infringement. In *Higgs v. Goodwin*, E. B. & E. 529 (E. C. L. R. vol. 96), there was a patent for treating chemically the sewage of towns, by which a precipitate was obtained that was useful for agricultural purposes. The patentee used the hydrate of lime. The defendant, who represented the Board of Health for Hitchin, in Hertfordshire, had separated a great part of the sewage matter from the water by filtration, and then applied hydrate of mercury, but did so not with the intention of turning the precipitate to value, but of getting rid of it. The jury thought that the defendant had infringed the plaintiff's patent, but the Court held that the intention was important, and, as the plaintiff had the intention to produce something which was commercially valuable, and the defendant did not interfere with that purpose, but avoided it altogether, what he did was no infringement. In that case there was

no doubt some question of fact for the jury, but that question of fact being ascertained, the question of infringement became one for the Court. So in *Barber v. Grace*, 1 Exch. 889, the patent was for pressing woollen hosiery between heated boxes. The defendant introduced heated rollers instead of boxes, and it was held by the Court not to be an infringement. The new form was a new invention. So here anybody was at liberty to apply centrifugal force for the purpose of winding cotton, provided only that he did not apply it in the exact way described in the patent. In his disclaimer the plaintiff has not disclaimed the title or the means, but only the supposition that he claimed the application of centrifugal force to this purpose as his invention.

[**LORD CHELMSFORD.**—He disclaims all applications of that principle, except the application of it as particularly described in his specification.]

But his disclaimer is not there exact as it should be.

[**The LORD CHANCELLOR.**—Suppose there to be six modes of applying centrifugal force: he first claims all six, then finding that five of the six are in use, he disclaims all but one; may he not do so and have a valid patent?]

Saunders v. Aston, Webs. Pat. Cas. 75 n.; (a) *Morgan v. Seaward*, Id. 178, 2 M. & W. 544, Murph. & Hurl. 55; *Neilson v. Harford*, Webs. Pat. Cas. 320, 8 M. & W. 806, show that a misleading specification cannot sustain a patent. And such a doubtful disclaimer as the present will not cure it. The plaintiff's patent now depends on his disclaimer, and that does not fulfil the condition of showing men both what they are to do and what they are to avoid. A man cannot limit the disclaimer for the purpose of saving the novelty, and enlarge it for the purpose of saving the infringement. That has been done here. The evidence here shows that the defendants' machine was much more like Dyer's than the plaintiff's, and in fact disproves the pretence of infringement, and so the Judge ought to have decided on the construction of the patent, which is a matter only for the Court: *Neilson v. Harford*, Webs. Pat. Cas. 320, 8 M. & W. 806. The jury ought to have been distinctly told that there was no evidence of infringement, and that the verdict must be for the defendants.

July 19. **The LORD CHANCELLOR (LORD CAMPBELL).**—On the appeal by the defendants below against the plaintiff below, I am clearly of opinion that the judgment of the Court of Exchequer Chamber ought to be affirmed, for the reasons assigned in delivering the judgment of the Court of Queen's Bench, which was affirmed by the Court of Exchequer Chamber.

The other appeal, that of the plaintiff below against the defendants below, raises the question, whether at the conclusion of the plaintiff's case, the presiding Judge ought to have directed a nonsuit, on the ground that although the novelty of the plaintiff's invention might be established, there was no evidence of infraction. This depended upon the examination of two scientific witnesses of great experience and respectability, who are much more familiar with such machinery than any Judge on the bench. They, after having described the plaintiff's machine and a machine of the defendants, manufactured

and sold by them (which was the alleged piracy), swore as follows:—"That there was not any substantial difference between them; that the defendants' presser so far resembled the plaintiff's in the peculiar distinctive quality of bringing the weight nearer to the source of motion, by bringing it higher up the leg, and by so bringing it higher up the leg, there was less tendency to create that vibration which was fatal to Dyer's presser, and that this was the distinctive property and advantage of the plaintiff's presser, and that the defendants' gives the peculiar advantages of the plaintiff's in a great measure." Those witnesses may be considered as saying, that the defendants' machine sought to attain the same object as the plaintiff's, and substantially by the same process.

I must confess that I have still great difficulty in seeing, how, while these witnesses stood uncontradicted, the Judge could have at once withdrawn the case from the jury. Contradictory evidence was afterwards adduced by the defendants, but this could not strengthen the renewed application for a nonsuit. Where *novelty* or *infringement* depends merely on the construction of the specification, it is a pure question of law for the Judge; but where the consideration arises how far one machine, or a material part of one machine, imitates or resembles another in that which is the alleged invention, it generally becomes a mixed question of law and fact which must be left to the jury.

In the present case, the plaintiff certainly was not entitled to a verdict without proving that the defendants had substantially used that particular mode of roving cotton to which his disclaimer confined him. No exception was taken to the manner in which the question was left to the jury. There might be a wrongful and actionable imitation of the plaintiff's machine, although it was not closely copied in all respects; and the degree of similitude or difference which is or is not to constitute piracy, seems, generally speaking, to savour more of fact than of law. In the present case, the difference chiefly relied upon was that the centrifugal force acts on a higher plane in the plaintiff's machine than in the defendants'. This was a very fit topic to be addressed to the jury, but I must very seriously doubt whether the Judge would have been justified in stopping the trial, by saying that there could be no infraction unless in both machines the centrifugal force acted exactly in the same plane.

However, notwithstanding these doubts, as I understand that my noble and learned friends, who heard this appeal argued at your Lordships' bar, agree in thinking that the judgment of the Court of Exchequer Chamber on this point was right, I have not so strong an opinion in the contrary direction as to force me to dissent, and I shall concur with them in advising your Lordships that upon both appeals the judgment be affirmed.

LORD CRANWORTH.—In this case, the Judges in the Exchequer Chamber directed a new trial, because, in their opinion, there was no evidence of infringement. The plaintiff has appealed, because he says there was evidence, and that, therefore, he ought to be allowed to maintain his action. The defendants have appealed, because they say the invention now relied on is not that for which the patent was granted. The Court of Queen's Bench, on the latter point, was unani-

mous in favour of the plaintiff, and a majority of the Judges in the Court of Exchequer Chamber concurred.

I adopt the same opinion. I think, reading the specification in a fair spirit, we must understand the patentee to have said, that he claimed as his invention the application of centrifugal force to the flyers in the mode elaborately explained in his diagrams. But then he did not confine himself to that mode; he claimed, farther, the application of the principle of centrifugal force to flyers used in machinery for preparing and roving cotton, in whatever way it might be applied. The effect of the disclaimer was to strike out of the specification this latter general claim, leaving only the claim for the particular mode of application specially described. I think it would be unreasonable and hypercritical to say that on a specification so framed the patentee had not claimed as his invention, or as part of his invention, what he had described. And when, therefore, by the disclaimer the general claim is abandoned, the particular claim remains good. This disposes, therefore, of the cross-appeal.

On the original appeal I think that the Court of Exchequer Chamber was right in holding that there was no evidence of infringement, and so that there must be a new trial.

By the disclaimer the right of the plaintiff was confined to the application of centrifugal force, by means of a weight acting on a presser, so as to cause it to press against a bobbin, a weight working in a plane above the rest of the machinery, as described in the specification. There was no evidence of the defendants having so applied centrifugal force. Their machine had no weight. The weight referred to in the specification is a distinct part of the machinery. The claim is not for the application of centrifugal force by means of *weight* acting on a presser, but by means of *a weight*, and of *a weight* acting in the manner minutely described in the specification. This is not the case of an equivalent. What the defendants did, was to obtain the advantage of pressure, by means of centrifugal force, obtained without *a weight* acting in the manner described by the plaintiff, and forming an essential part of his claim. If the machine of the defendants is an infringement of the plaintiff's patent, then he, in truth, retains the benefit of all which he has disclaimed. I am, therefore, of opinion that the judgment of the Exchequer Chamber was right, and, so that both appeals ought to be dismissed.

LORD WENSLEYDALE.—My Lords, there are two questions for your Lordships' decision in this case. The first, whether the defendants are entitled to have a rule to enter judgment for them on the point reserved. The second, whether, upon the evidence stated in the case agreed upon between the parties, there was any evidence to go to the jury of an infringement of the patent as limited by the disclaimer.

Upon the first question, which is, whether, after the disclaimer entered pursuant to the statute 5 & 6 Will. 4, c. 83, the patent was good for the particular machine described in the specification, I certainly have doubted. I have had a doubt whether the judgment of the Court below was right on this point, and that doubt is not altogether removed. I do not think this is the sort of case to which the statute was meant to apply. The patent is for every sort of application of the law or principle of centrifugal force to flyers used in machinery, or

apparatus for slubbing and roving cotton, &c., and not for a particular machine or form of doing this, and the disclaimer is founded on a false suggestion (for false it certainly was) that the patentee's claim might be construed to be more extensive than he intended. That appears to me to be quite a fiction. It is now converted into a patent for a particular machine. But my doubt is by no means such as to induce me to dissent from the united opinions of the Judges of the Court of Queen's Bench, and the opinions of the majority of the Judges of the Court of Error, and, therefore, I agree that the judgment must be affirmed on the point reserved by Lord Campbell on the trial.

The other question is then to be considered, whether there was any evidence to go to the jury of the infringement of this patent right by the defendants. That this question is open upon the rule pronounced by the Court of Queen's Bench, has been already decided by your Lordships. We may now assume that the patent was for the machine described in the specification and drawings annexed for the application of centrifugal force to the flyers employed in roving, and for that machine only; and the question is, whether it has been infringed by the defendants.

The question of infringement is one of mixed law and fact. The construction of the specification is for the Court, with the aid of such facts as are admissible, to explain written documents. In deciding whether there has been an infringement, there is a question of fact wholly for the jury, viz., what the defendants have done; and if scientific evidence is necessary fully to elucidate the case on either side, it is no doubt admissible, and in determining the question of infringement, the Judge must apply what the jurymen find to be true. This is generally done in summing up the case by the Judge, he leaving the necessary facts to the jury, and giving conditionally the necessary directions in point of law. The opinion of scientific witnesses is only admissible as proof of facts. Their opinion as to whether there has been an infringement or not, though sometimes received, in order to save time and trouble, is, strictly speaking, inadmissible, and if objected to, ought to be rejected. The Court alone is to decide questions of law.

The question for your Lordships in this case is, simply, whether the facts proved by the witnesses, and set out in the case, were sufficient evidence which ought to have been left to the jury as proof of infringement by the defendants; that is, where they are such as, if the jury believed them to be true, would warrant the finding that there had been an infringement of this patent for the particular machine described in the specification.

I have come to the conclusion that the unanimous opinion of the Judges of the Exchequer Chamber on this question is correct, and that when all the evidence stated is considered, there was not sufficient to warrant the jury in finding that verdict, and that the plaintiff ought to have been nonsuited. The Court of Queen's Bench seems to have given too much effect to the opinions of Messrs. Carmichael and May. In this case, the models of both machines are brought before us, and would be before the jury; and judging from them, we see for ourselves, that though they both answer the object of applying centrifugal force to the flyers, they do it in a different way. The

plaintiff's wire is distinct from the flyers; he uses what is in common parlance a weight, and that weight is at the end of the perpendicular wire, at the top of it, and could not be put lower without interfering with the bobbin; the defendants do not use such a weight, they distribute weight by a sort of case round the bottom part of the flyer, the centre of gravity being lower than the middle of the flyer. The evidence of the scientific witnesses cannot alter these facts, and their opinion that one machine is a piracy of the other is of no consequence whatever, for that is a question not in their province to decide. They prove, and indeed that is evident from the models, that in the plaintiff's the centrifugal force operates on a higher plane than in the defendants', and that in that respect the plaintiff's is a better invention than the defendants'. But that shows that the machines operate differently, though they both operate on the finger or presser by centrifugal force. If the claim in the patent had continued to be for *any* mode of applying centrifugal force to the finger or presser, undoubtedly the defendants' machine would have been an infringement. But the disclaimer puts an end to that argument, and the patent being for a particular machine only, which clearly operates differently from that of the defendants, it seems, I own, to be very clear that one is not a piracy of the other. It is only by confounding the patent as it was, with the patent as it is, that an infringement of the patent can be made out.

Therefore, I think that your Lordships ought to affirm the judgment, and that there should be a new trial.

LORD CHELMSFORD.—My Lords, there are two questions in these cases, first, as to the validity of the disclaimer; second, as to the evidence of infringement.

Upon the first point, I am of opinion that the disclaimer did not extend the right granted by the letters patent, nor did the specification, as altered by the disclaimer, describe another and a different invention from that for which the patent was granted.

The plaintiff by his original specification, shows that he considered himself to be first discoverer of the application of centrifugal force to that part of the machinery for roving cotton by which the sliver or roving is wound upon the bobbin. But it is evident that the idea which led to his taking out his letters patent, was the application of the principle of centrifugal force to flyers, as embodied in the machine which is described in his specification and drawings. Acting, however, under the impression that he was the first discoverer of the application of the principle generally, he proceeds, after the description of his specific machine, to state that he does not intend to confine himself to the particular method represented, but that he claims as his invention "the application of the law or principle of centrifugal force to the particular or special purpose above set forth."

Now there may be some doubt whether, upon a claim so general, his patent would have been sustained; but at all events, if any person had previously applied centrifugal force in any manner to the flyers, for the purpose of winding the cotton on the bobbin, the letters patent would have been void. The plaintiff, therefore, having probably heard of Dyer's patent, proceeded to enter a disclaimer. Assuming that the specification had been originally bad, on account of the

generality of the claim, I see nothing in the Act of Parliament which prevents such an objection as this being removed, the only limitation to a disclaimer of any part of the specification being that it shall not extend the exclusive right granted by the letters patent. Whether the disclaimer in this case does extend the right must depend upon the construction of the original specification. Now, I do not understand the specification to claim, as the plaintiff's invention, the application of the law or principle of centrifugal force generally to flyers, and then to describe and exhibit the particular machine as an illustration of the mode in which that general principle might be carried into effect; but it appears to me, that the plaintiff first claims the particular method described, and afterwards every other application of centrifugal force to the purpose set forth. Then, when he disclaims all application of the law or principle of centrifugal force, except only the application of centrifugal force as described in the specification, he does not abandon the whole of his invention, and leave himself nothing but an illustration of it; but he gives up all that is general, and limits himself to the particular method, which was a substantial and independent claim, to which the general claim had previously been superadded.

In this view the disclaimer certainly does not extend the right, nor can it be said to describe a different invention.

But the disclaimer, having thus narrowed the claim, and having fixed it to the precise and particular machine described, the question of infringement is brought to a very simple point. This question must necessarily be one of fact, because it depends upon something which has been done by the defendants, by which the plaintiff's right is alleged to have been invaded. But it may become a matter for the Judge to determine, not whether the acts have been done, but whether, upon proof of their having been done, the plaintiff has any case.

The mere production of the machine used by the defendants may satisfy the Judge that it is entirely different from the plaintiff's, and therefore that there is no evidence of infringement to go to the jury, and such, I think, ought to have been the view taken in this case. The nature of the plaintiff's invention is limited by the disclaimer to the application of centrifugal force by means of a weight acting upon a presser, so as to cause it to press against a bobbin, as described in the specification. Now, the weight mentioned in the specification, and shown in the drawing, is not only a substantial but an essential part of the machinery, and the mode of its application may be said to be the very machine itself. But the defendants' has no weight at all, in the sense of the plaintiff's specification. The scientific witnesses, indeed, say that the plaintiff's weight is carried up the leg of the flyer to the upper part, or in other words, that it is placed at the top of the leg of the flyer, and that the defendants' weight is carried a little more than half way up the leg; but this application of the term "weight" to the defendants' machine is really only an ingenious mode of establishing its resemblance to the plaintiff's. The defendants have no weight, properly so called, to come up or down the leg of the flyer, but use a vertical rod, consisting of a solid piece of metal, on the leg of the flyer, which itself constitutes the means

of working the presser, and which is entirely different from the wire, with the upper end bent, and a small weight attached thereto, which is the plaintiff's invention. As the plaintiff is therefore confined by his disclaimer to the precise machine which he has described, and the machinery of the defendants is not similar to it, though producing the same result, the jury at the trial ought to have been told, that there was no evidence of infringement; and the judgment of the Court of Exchequer Chamber is therefore right, and must be affirmed.

Judgment of the Court of Exchequer Chamber affirmed, and appeal dismissed.

HEATHFIELD YOUNG, Plaintiff in Error. RICHARD H. BILLITER, Defendant in Error. *June 25, 26; July 6; August 3(a)*

The words "fraudulent and void as against the assignee of such" persons contained in the 59th section of the 1 & 2 Vict. c. 110, s. 59, do not mean fraudulent and void absolutely, but only as to the assignee, so that a transaction forbidden by that section, and declared "fraudulent and void as to the assignee" may be valid as to other persons.

Wherefore F., a debtor, intending to petition the Insolvent Debtors' Court, voluntarily gave Y., one of his creditors, a warrant of attorney on which Y. entered up judgment, and issued execution, and the sheriff seized and sold the goods; and F. afterwards presented his petition, and an assignee was appointed:

Held, that the assignee could not treat the transaction as void from the beginning and maintain trover against Y. on an alleged wrongful conversion at the time of the seizure.

The assignee brought trover, alleging in the first count, that the creditor Y. wrongfully deprived F. of the goods. Y. pleaded not guilty, and also the warrant of attorney and the execution under it. The assignee replied, that after the 1 & 2 Vict. c. 110, and within three months before F.'s imprisonment, F., being in insolvent circumstances, did, with the intent of petitioning the Court, &c., voluntarily, fraudulently, and contrary to the statute, charge his estate in favour of Y., a creditor, by means of a warrant of attorney, fraudulent and void within the statute, whereby Y. obtained execution, &c.:

Held, that on this pleading trover was not maintainable against Y. *Qu.* Whether under such circumstances as these there could be any form of action by which the assignee could obtain redress?

Qu. also, whether judgment having been entered for the Plaintiff in the Court below, the House had power to do more (except by consent) than to reverse the judgment, and order a *venire de novo*?

THIS was an action of trover for goods, brought by Billiter, as the assignee of Flint. The first count alone is material to be stated. That count charged the defendant with converting, or disposing to his own use, or wrongfully depriving Flint, the insolvent, of the goods in the first count mentioned. The defendant pleaded several pleas, of which only two require to be noticed: not guilty; and, for a fourth plea, that before Flint became insolvent, the defendant recovered judgment against him, and took his goods in execution, and that such taking, and the sale thereof, were the conversion complained of. The replication to this fourth plea alleged, that after the 1 & 2 Vict. c. 110,(b)

(a) 8 H. of L. 682.

(b) 1 & 2 Vict. c. 110, s. 59. "If any prisoner shall, before or after his imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, bond, bill, note, property, goods, or effects whatsoever, to any creditor, or to any person in trust for, or to or for the use, &c., of any creditor, every such conveyance, assignment, transfer, charge, delivery, and making over shall be deemed, and is hereby declared to be, fraudulent and void as against the provisional or other assignee or assignees of such prisoner appointed under this Act: Provided that no such conveyance, assignment, transfer, charge, delivery, or making over shall be so deemed fraudulent and void unless made within three months before the

and within three months before Flint's imprisonment, he, Flint, being in insolvent circumstances, did, with the intent of petitioning the Court for the relief of insolvent debtors, voluntarily and fraudulently, and contrary to the statute, charge his estate in favour of Young, then being a creditor, by means of a warrant of attorney, fraudulent and void within the statute, whereby, and not otherwise, Young obtained the judgment and execution aforesaid, which were fraudulent and void.

The cause was tried at Lewes at the Spring Assizes of 1853, before Mr. Justice Coleridge, when it appeared that on the 20th February, 1852, Flint gave to Young a warrant of attorney to secure payment of 230*l.*, with interest, at a time specified; that on the 10th March, 1852, judgment was signed on this warrant of attorney; on the 23d March, a *fi. fa.* was issued to levy 235*l.*; that the writ was delivered to the sheriff, who seized the goods on the following day, and sold them on the 26th; and on the 16th April made a return to the writ that he had levied 128*l.* 8*s.* 4*d.* On the 19th April, Flint was arrested by a creditor; on the 23d April he filed his petition; and on the 24th April the vesting order was made, vesting the estate of the insolvent in the provisional assignee. On the 5th June, 1852, Billiter was appointed the creditors' assignee. No demand and refusal were proved; but this action was commenced on the 25th November, 1852. In the course of the trial, the plaintiff offered in evidence an adjudication of the Insolvent Court, by which Flint was remanded for one year for having charged or mortgaged his property fraudulently, with the intent of diminishing the sum to be divided among his creditors. The defendants' counsel objected to the contents of the adjudication being read, but the objection was overruled. The learned Judge left the case to the jury, on the question, whether the giving of the warrant of attorney was a voluntary preference; observing, that it was for the plaintiff to establish that fact, and that there was evidence upon it for the consideration of the jury. Exceptions were taken to the admission of the contents of the adjudication, and to the direction of the learned Judge. A verdict was found for the plaintiff, and judgment entered for him, after which proceedings in error were taken, and the judgment was affirmed in the Exchequer Chamber.^(a) The case was then brought up to this House under the Common Law Procedure Act, 1852.

The Judges were summoned, and Lord Chief Baron Pollock, Mr. Justice Wightman, Mr. Justice Williams, Mr. Justice Crompton, Mr. Baron Channell, and Mr. Justice Blackburn attended.

Mr. *Vernon Harcourt*, for the plaintiff in error.—Trover is not maintainable here by the assignee. The person who alone can maintain it must have, at the time of the alleged conversion, the possession of the goods, or the right of possession: 2 Williams' Saunders, 47 *a*, 47 *k*. There was no such right in the insolvent at the time of the seizure, for he had voluntarily done that which was a mode of delivery of them to the creditor; and there was no such right in the assignee, for, until

commencement of such imprisonment, or with the view or intention, by the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the said Court for his discharge from custody under this Act."

(a) 6 E. & B. 1 (E. C. L. R. vol. 88).

after the insolvency and the vesting order, the property of the insolvent did not vest in him, and when it did, there was nothing in the 1 & 2 Vict. c. 110, which operated by relation backwards, to give him any property in goods already disposed of by the insolvent. The security here was not void, but only voidable. The word "void" in a statute has often received such a construction: The Lincoln College Case, 3 Co. Rep. 53, 59 b. So in *Bryan v. Child*, 5 Exch. 368, the words "null and void," in the 12 & 13 Vict. c. 106, s. 137, received the construction of voidable only. But even if the words should be strictly construed, and the security be null and void, trover is not maintainable. The act done may be utterly void, but still there may not have been any wrongful conversion of the goods which were the subject of that act: *Horwood v. Smith*, 2 Term Rep. 750. There property that had been stolen had been *bond fide* purchased in market overt by the defendant, and by him sold again, and it was held, that the defendant was not liable in trover. In *Peer v. Humphrey*, 2 Ad. & E. 495 (E. C. L. R. vol. 29), the defendant had *bond fide* purchased some stolen property, but as he did not purchase it in market overt, trover was held maintainable against him, but that was because no property had passed by the sale. Here it did pass, and the question is, whether what was complete and valid at the time can afterwards be in this manner rendered invalid. The judgment in *Stephenson v. Newnham*, 13 C. B. 285, 302 (E. C. L. R. vol. 76), shows that it cannot. In order to maintain trover, there must be some act of wrongful conversion at the moment: *Wilmshurst v. Bowker*, 5 Bing. N. C. 541 (E. C. L. R. vol. 35); *Nixon v. Jenkins*, 2 H. Bl. 185. There was a period here during which the transfer was good, and the property had passed; the assignee, therefore, cannot claim it back in trover from the person who, at the moment he disposed of it, had a valid title to do so. In *Nicholson v. Gooch*, 5 E. & B. 999 (E. C. L. R. vol. 85), a member of the Stock Exchange, under engagements with other members, wrote to the secretary to say that he could not fulfil his engagements; he was, accordingly, under the rules of the House, declared a defaulter, and the secretary received what was due to him from some members and distributed it among those to whom he was indebted; he was afterwards declared a bankrupt under the Act of 1849; but even under the Bankrupt Act it was held that the money thus distributed could not be recovered from the secretary as money had and received to the use of the assignees, for it did not bear that character at the time he received it. *Brook v. Mitchell*, 6 Bing. N. C. 349 (E. C. L. R. vol. 37), establishes that nothing vests in the assignee at the moment the warrant of attorney is executed, but only from the time of the insolvency, and that the act done can only be void as against those who, at the time of its being done, had the right to the possession of the property.

This case ought to be left, as was suggested in the judgment read by Chief Justice Jervis in the Exchequer Chamber, to "the general principles of the law applicable to fraudulent and void transactions." In *Dillon v. Edwards*, 2 Moo. & P. 550, which related to the construction of the 3 Geo. 4, c. 39, an action of this kind was sustained against the sheriff on the ground that the goods were in his hands at the time of the action brought, but that is in opposition to the cases

already quoted, and cannot be supported, though it is to be observed that in that case the goods, then undisposed of, were formally demanded by the assignees after the bankruptcy, and the sheriff formally refused to deliver them up. [Some discussion here took place on the use of the word "or" in the statute 3 Geo. 4, c. 39, s. 2. "The moneys levied *or* the goods seized" are the words there used; the word *and* is used in the 1 & 2 Vict. c. 110, s. 60, which recites and adopts the provisions of the former statute.]

[LORD WENSLEYDALE.—Suppose the transaction absolutely void, it would then be as if the bankrupt by his own act had transferred the goods. The assignees might then, under the words in 3 Geo. 4, "the moneys levied or effects seized," recover the property wherever they found it.]

That could not have been the intention of the legislature, for then, if the property remained in specie, it might be taken from every *bond fide* purchaser, not merely the second but the tenth or even the fifteenth purchaser, and the illegality of the transfer would not depend on any act of the purchaser, but on that of the insolvent. Such a construction would violate the principle which it admitted had been established in *White v. Garden*, 10 C. B. 919 (E. C. L. R. vol. 70), that a fraudulent transferee could make a good title to a *bond fide* purchaser under him. *Biffin v. York*, 5 M. & G. 428 (E. C. L. R. vol. 44), 6 Sc. N. R. 222, turned on the fact of delay by the creditor. In *Becke v. Smith*, 2 M. & W. 191, it was held that an assignment made at any time, even a year previous to the imprisonment, if made with the view of petitioning the Court for the insolvent's discharge, was, under 7 Geo. 4, c. 57, void, but then, as explained by Mr. Baron Parke in the judgment,^(a) that was because of the express words of that statute. There are no such words here. The words "as against the assignees," added to the word "void," show that that word can only be applied when, and not before, there are such persons as assignees in legal existence. Apply the principle to the case of an entry made upon land under the authority of a person who afterwards becomes insolvent. Could a person who made the entry *bond fide* be afterwards treated as from the beginning a trespasser? There is a whole class of cases, of which *Weymouth v. Boyd*, 1 Ves. J. 416, 424, is one, showing that he could not be so treated.

[The LORD CHANCELLOR.—That general proposition need not be disputed, but it does not show that the transaction itself is not void from the beginning.]

There is no evidence here of a conversion, for, as was said in *Weymouth v. Boyer*, "the defendant did not wrongfully convert the goods, for they were left in the defendant's hands to be sold." Under such circumstances an auctioneer could not be held guilty of a conversion.

[LORD CHELMSFORD.—Suppose the goods had been in the hands of Young at the time of the bankruptcy, could the assignee maintain trover for them without a demand and refusal?]

Here they had been sold. It does not appear on the replication to the fourth plea what became of the money produced by the goods; it might have been handed over to the insolvent himself before he was

(a) 2 M. & W. 196.

an insolvent, or it may have been paid to the assignees, or be still held by the sheriff on their account.

[The LORD CHANCELLOR.—The count alleges that the defendant wrongfully deprived Flint of the goods, and the replication shows how that wrongful act was effected.]

But it is consistent with the pleadings that the money is still in the hands of the sheriff. The allegation in the count that the defendant wrongfully deprived Flint of the goods is inaccurate. There should have been a statement that Flint had assigned the goods to the defendant, and that the defendant had dealt with them under that assignment. As the allegations now stand, they improperly give the transaction the character of an act of bankruptcy. This may be most unjust. Suppose an insolvent to lend a creditor a horse worth 200 guineas; while in the creditor's possession, but without any fault of his, the horse falls lame, and is worth only 10 guineas. The title of the assignees then accrues. Why are they to refuse to receive the horse in its then state, and to recover it in trover as it was when it was lent, and so to be in a better situation than the insolvent would have been had he never become insolvent?

Mr. *Lush* (Mr. *Bovill* was with him), for the defendant in error.—The plaintiff's pleading here is good. The transaction is void. The Courts have held transactions of this kind to be only voidable in cases where they have found a manifest intention in the statute so to treat them, of which The Lincoln College Case, 3 Co. Rep. 53, 59 *b*, is an instance. But what was the object of the legislature in this enactment? It was that the property of the insolvent should be equally distributed among his creditors, and that anything done to defeat that object should be void. The mischief to be guarded against was, that of the debtor making away with his property to some favoured creditor. To prevent that mischief the strongest words were used.

[The LORD CHANCELLOR.—No; they might have been wholly unqualified, but they are not; the transfer is not declared to be absolutely void, but void as against the assignees.]

There was this reason for those words: not to make the transfer void as to the debtor who made it, but to make it void as to the creditors whom it might injure. The clause relates to spontaneous acts of the debtor, not to those which are forced from him by importunity and pressure; this was a spontaneous act. In the former case the legislature says that such transfers of property shall not only have no operation, but that they shall be deemed fraudulent and void. They are void *ab initio*, and the property is still deemed part of the assets.

[LORD CHELMSFORD.—Do you mean void from the time of its being done as against a possible assignee?

LORD WENSLEYDALE.—So that no one can acquire a title in the mean time?]

That may be open to argument. It is at all times defeasible. It is conditionally void when the title of the assignee accrues; it is void from the beginning, though there are cases which assume that there may be a good title created in the mean time.

[The LORD CHANCELLOR.—In the first count it is stated that the

plaintiff was wrongfully deprived of these goods. How do you support that?]

In this way: the object of the statute is to secure the property for the estate; the favoured creditor cannot set up any right to that property under a license or assignment from the insolvent, for the statute declares such assignment fraudulent, and void as against the assignees. It is to be treated as if it had never taken place, and farther, as a fraudulent preference, so that the creditor shall not be permitted to justify under the assent of the debtor. Flint not having the power to consent to transfer the goods, it is properly alleged that he was wrongfully deprived of them. Here the goods have been sold; they have therefore been converted, and a demand is not necessary. The refusal to deliver them would not have been a conversion, for the defendant had not got them; the sale was not wrongful as to the assignees, for they were not then in existence, but it was so as to the debtor who, by law, had no power to assent to it. The creditor, therefore, could not justify under the unwarranted and voluntary act of the insolvent.

[LORD WENSLEYDALE.—The pleadings do not show that it was voluntary.]

Yes, that very word is used in the replication.

The cases referred to have little bearing on the subject. The intermediate sales may be good, though the original transaction may be void: *Hoe's Case*, 5 Co. Rep. 90 b. But that does not enable a creditor who takes directly under an insolvent to set up the authority of that insolvent, when in law he had none to give.

[LORD WENSLEYDALE.—The only averment here is, that there was a charge on the property. The goods never came to the hands of the defendant; they were in the hands of the sheriff.]

That is equivalent to a delivery over by the insolvent, and brings the case within the words of the statute. The transaction was perhaps rightful at the time, but it became, by the statute, wrongful afterwards.

[The LORD CHANCELLOR.—You claim through the insolvent?]

No, paramount to him.

[The LORD CHANCELLOR.—The declaration is, that the defendant wrongfully deprived the insolvent, &c.]

That is to make the transaction altogether wrongful. It is true that the form of action is not given by any statute, but it is properly applicable here.

Mr. *Vernon Harcourt* replied.

The Lord Chancellor proposed the following question for the consideration of the Judges:—"Upon the whole record in this case, how in point of law ought judgment to be given?"

July 6. Mr. Justice BLACKBURN.—My Lords, this case has been considered in the Court below by Judges, some of them now no more, and their judgments distinguished for unusual force of reasoning and precision of thought, are in print. It is not my purpose to attempt to add anything to the reasons so fully given below, but merely to state the conclusions to which, after some hesitation, I have come, on considering these reasons.

On the whole, I think that the reasons stated in the beginning of

the judgment of Lord Wensleydale, delivered after his retirement from the bench by Mr. Justice Crowder, preponderate over the powerful arguments of the majority of the Court below. I think that the better construction of the statute is, that the transaction is valid till the assignees indicate an intention to treat it as void, and that consequently the act of seizing or selling the goods under the authority of the transfer, whilst yet valid, cannot be treated as being a wrongful conversion. This opinion, if correct, disposes of the whole question, as it follows that there must be a *venire de novo*. I think it right, however, to guard against its being supposed that in my opinion no action at the suit of the assignees would lie against the favoured creditor. On the contrary, I am strongly disposed to think that as soon as the assignees avoid the transaction they may, by an action for money had and received, or at all events by a properly shaped action, make the favoured creditor refund any benefit which he has wrongfully received; and, probably, if they can aver and prove that the defendant was a party to the fraudulent transaction, knowing it to be such, they may recover the full damage sustained by the estate, though greater than the benefit received by the defendant; but for this purpose the *scienter* is material. It is not necessary to decide how this is; for, supposing it to be so, still the present action would not lie. The distinction, as pointed out by my Brother Williams in his judgment below, is not merely technical. If the present action lies, an innocent party receiving a small benefit may be made liable for the whole value of the goods, which, in the view I have above suggested, is not the case. This, however, I merely state to guard against being supposed to have given any opinion that no such action lies. It is no part of the grounds of my opinion in the present case.

I answer your Lordships' question by saying that, in my opinion, there should be a *venire de novo*.

Mr. Baron CHANNELL (after stating the declaration, pleas, and replication) said.—The defendant directed and may be taken to have assisted the sheriff in the sale of the goods under the execution grounded on the judgment signed on the warrant of attorney, and an amount levied under the writ was paid over to the defendant. The defendant's conduct may be taken to have been *bona fide* throughout.

The facts stated in the replication (apart from any conclusion of law) are to be considered, for the purpose of your Lordships' question, to be correct. If they afford an answer to the fourth plea, the plaintiff is entitled to judgment on the whole record. If the facts so replied do not in themselves afford an answer, and there is no sufficient evidence to go to the jury, under the plea of not guilty, of a conversion by the defendant of goods of the insolvent, then there should, I think, be a *venire de novo* by reason of misdirection of the Judge at the trial, who on the plea of not guilty left that question to the jury.

The questions which arise on the issues joined on the first and fourth pleas are not identically, but are substantially the same. They involve, as it appears to me, these two considerations: first, whether in the event of the assignee of the insolvent not affirming the transaction of the warrant of attorney and judgment the transaction is as against him absolutely and *ab initio* void; secondly, whether supposing the transaction to be so void as against him, there has been a

conversion by the defendant of the goods of Flint. Both these questions turn upon the construction to be placed on the 1 & 2 Vict. c. 110, s. 59. That section is (see *ante*, 683 n).

To hold that this section renders the transaction actually void as against the assignees, instead of merely enabling the assignees to avoid the transaction at their election, and thus to put the transaction on the footing of a preference in bankruptcy before a fraudulent preference was made an act of bankruptcy, may no doubt give rise to some of the inconveniences pointed out in the argument at your Lordships' bar. But the words of the statute are to my mind clear and distinct. The legislature has enacted that the transaction shall be deemed, and it is by the Act declared to be, void as against the assignee. The object of the legislature was, I think, to protect the interests of the general body of creditors, and to prevent any one creditor having the advantage, however innocent or ignorant that creditor may be, of any preference of him by the insolvent. If this construction gives rise to some hardship in certain cases, it must be remarked that to adopt a different construction would have the effect, in other cases, of withdrawing, from distribution amongst the general body of creditors, property of the insolvent fraudulently parted with by him with a view to his petitioning the Court. I think there is no mode by which what I understand to be the intention of the legislature can be fully and effectually carried out, but by holding that the transaction actually, and *ab initio*, is void as against the assignees. Assuming this to be the correct construction of the statute, has there been such a conversion by the defendant as will sustain the first count? I think that there has been such a conversion.

By the act of the defendant in issuing the writ of execution, goods, which according to my view must be taken to have been the property of the insolvent, have been seized and turned into money, and the defendant has received that money. Considering the intent with which the warrant of attorney must be taken to have been given by the insolvent, viz., to enable a creditor fraudulently preferred by the insolvent by means of a judgment to seize the goods of the insolvent, the transaction is, I think in substance, the same as a transfer or delivery, on the moment, of the goods seized under the execution; and though the defendant was innocent of any intent or preference which the insolvent may have had in his mind, and only dealt with the goods by the process of the law, the seizure and sale directed or caused by the defendant, and the receipt by him of money from the sheriff, all which acts were by the statute 1 & 2 Vict. c. 110, s. 59, void as against the assignees, constituted, I think, a tortious conversion by the defendant sufficient to enable the plaintiff to maintain this action, and that no demand and refusal were necessary or could have been available.

The effect of the statute is, I think, to estop the defendant when sued by the assignees, from saying that he so received the goods (taking the case as one of transfer) under any such license or authority of the insolvent as to make the defendant's dealing with the goods under the execution an innocent and not a tortious dealing with the property of the insolvent, whose interest, for the benefit of the general creditors, the plaintiff represents.

Whether an enactment so general as that under consideration is a wise or just enactment is not for the Judges to consider, provided the effect and meaning be clear. The clear effect of the enactment is, in my humble opinion, what I have stated.

I think my Brother Martin's view as to the form of the action, as expressed by him in his judgment in the Court below, is a correct one, viz., that the declaration may be read thus: that the defendant, before Flint became an insolvent, converted to his own use and wrongfully deprived Flint of the use and possession of the goods, and the plaintiff as assignee was damaged by reason thereof. The defendant did wrongfully deprive Flint of the goods, to the prejudice and damage of the plaintiff as assignee, if the effect of the statute is to render the transfer void *ab initio* as against an assignee when appointed. When the assignee sues, the effect of the statute is to estop the defendant who has procured or directed a sale of the goods, from saying he dealt with the goods by such authority or license of the owner as prevented that dealing from being tortious with respect to the assignee.

This view conflicts somewhat with an opinion expressed by the Courts of Common Pleas and Exchequer Chamber in *Newnham v. Stevenson*, 13 C. B. 285, and also in *Brook v. Mitchell*, 6 Bing. N. C. 349 (E. C. L. R. vol. 37). But I think, for the reasons stated by Mr. Justice Cresswell, in his judgment in this case in the Exchequer Chamber, and by the late Lord Chief Justice Jervis on the occasion of his reading the judgment of the late Mr. Justice Maule, in this case, that the two cases referred to ought not to govern the present. If considered in point with the present case and not distinguishable from it, those cases ought, in my humble opinion, to be overruled by your Lordships.

I answer your Lordships' question by saying, that in my humble opinion judgment upon the whole record ought in point of law to be given for the plaintiff.

Mr. Justice CROMPTON.—My Lords, the expression "void as against the assignees," in section 59 of the 1 & 2 Vict. c. 110, seems to me clearly to imply that the transaction is to be valid as against the insolvent so as to give the creditor a title until it is impeached by the subsequently appointed assignee. The transaction is to be good except against the title to arise in the assignee in the case of subsequent insolvency. I agree, however, with the judgment of the majority of the Judges in the Exchequer Chamber, for the reasons given by them, which I will not repeat, that the assignee has a right, as against the favoured creditor, to treat the whole transaction as fraudulent and void, so as to be able to maintain an action against such favoured creditor for the damage to the estate arising from the fraud.

As to the nature of the action, however, which he has a right to bring (not altogether, as observed by my Brother Williams, a merely technical question), I have entertained great doubt.

It struck me at one time that the assignee might say, "I treat this transaction as entirely void. As far as regards you, the favoured creditor, at all events it can operate neither as a transfer of the property nor as an authority to deal with it. You are estopped by the

statute from denying as against me, that it remained the property of the insolvent, or from asserting, as against me, that you had any valid authority or license to deal with it. Whilst it so remained the insolvent's property, there was an actual conversion by your selling the goods, which makes a demand useless and idle, and there is a damage to the estate, that is, to me, the assignee, as alleged in the declaration; and I, therefore, prove the allegations in my declaration of property in the insolvent—conversion by you, the defendant, and damage to me, the plaintiff."

The case of *Martin v. Pewtress*, 4 Burr. 2478, cited by Mr. Justice Cresswell, is in favour of this view, as it would seem from the facts, and from the report of Lord Mansfield, where he says, "the plaintiffs could not recover unless the property was in the bankrupt;" that the action was for a conversion in the bankrupt's time. It was urged by the counsel in that case, and apparently assented to by the Court, particularly by Mr. Justice Yates, that in such case the assignees may set up the fraud, though the bankrupt, the party to it, cannot.

The case of *Nixon v. Jenkins*, 2 H. Bl. 135, does not seem to me to be inconsistent with that of *Martin v. Pewtress*, as in that case, as I read it, the action was for a conversion in the time of the assignees. There was no sale or actual conversion, but the goods remaining in the hands of the creditor, the Judges thought that, before making him a wrongdoer, in the absence of an actual conversion, there should be a demand and refusal; and they observed, quite accurately, that the assignees might affirm or disaffirm the contract. This seems to me quite right, and quite consistent with the right of the assignees to bring an action for an actual conversion, without making a demand; they showing, by bringing the action, that they are proceeding for a wrongful act, and are treating the transaction as fraudulent. Some of the later cases to which your Lordships have been referred, however, appear to me to be strong authorities against the right to maintain trover in a case like the present. I may remark in passing, that in the last of them, *Newnham v. Stevenson*, the Court expressly refrains from deciding whether an action would lie for the fraud.

My difficulty arises from the peculiar nature of the count in trover upon a conversion in the time of the bankrupt or insolvent, and in seeing how it is applicable to the present cause of action, which I think exists on the facts as stated in the bill of exceptions, especially as against a creditor cognisant of the circumstances, and as to whom it must be taken that there was evidence of his being a participator in the fraud. The count in trover, on a conversion in the bankrupt's or insolvent's time, seems to me to apply to a cause of action perfect in the time of the insolvent, and in respect of which time the damage is to be calculated, being the value of the goods at that time, unless under very peculiar circumstances, as where the goods have been returned. I understand the count in question to mean that the right of action for the damages has accrued in the time of the insolvent. Can that be said in a case like the present? The Act was certainly not wrongful when it took place, as it was good as against the insolvent, and no insolvency might ever have taken place. It appears to me that until the assignee is appointed, and the title vests in him,

and he chooses by bringing an action, or otherwise, to treat the transaction as invalid, no cause of action has accrued.

The real cause of action is the damage to the estate, when the title to it has vested in the assignee, and as there no relation back as in bankruptcy, which causes this case to resemble cases of fraudulent preference before the statute making such preferences acts of bankruptcy, or where that statute does not apply, the cause of action does not seem to me to arise till the assignee's title has commenced by the estate vesting in him. The damages, as pointed out by my Brother Williams in his judgment in the Exchequer Chamber, may be very different. If the right to sue arose to the insolvent by reason of a taking of his goods wrongfully as against him, the amount would be the value of the goods, whereas if the damage be the injury to the estate arising from the fraud, they may, in many of the cases put, be much less. In a special action, the real damage to the estate might, I think, be recovered, the declaration showing that the party was in insolvent circumstances, and voluntarily and within three months, or with the intention of petitioning, made the charge, delivery, or transfer, and that afterwards the insolvent petitioned, and that the plaintiff was assignee, and the estate was vested in him, and was damaged, and, if necessary, that the defendant was a party to the fraud.

In cases where the goods were in the hands of the creditors, there can be no difficulty in demanding them, and bringing trover on a refusal, and if the creditor has sold the goods, money had and received might, perhaps, lie, though I am much struck with the remarks of Mr. Justice Cresswell, as to whether money had and received is the proper form of action in such case.

Again, from what time does the Statute of Limitations run, as against the action of the assignees? Can it be from the dealing with the goods in the insolvent's time, when it is clear that there was nobody to sue, or is it not to run from the time when the assignee can sue? The first count seems, on the other hand, to apply only to a cause of action complete by the alleged conversion in the insolvent's time, from the date of which conversion the Statute of Limitations seems to commence running.

I am inclined, therefore, to think that the present cause of action arises only by reason of the accruing of the title of the assignees, and is not within the meaning of the first count, which I am disposed to think amounts to a statement of a cause of action perfect in the insolvent whilst he is insolvent, which passes as a chose in action to the assignees, and as to which the Statute of Limitations commences running from the date of the alleged conversion. This would show, that there was no such perfect and complete conversion in this case as against the insolvent, as would give him a right of action within the meaning of the allegation in the first count.

In the question proposed to us, your Lordships ask what judgment is to be given on the whole record. The parties not having adopted Lord Wensleydale's suggestion, you are called upon to decide the question in the first instance on the bill of exceptions, and if the count on a conversion in the insolvent's time is not applicable, there ought to be a *venire de novo*, and your Lordships could of course give no judgment on the rest of the record, as no judgment could be given

until it was known how the issues are found on a subsequent trial. In such case it is possible that the ends of justice might be answered by an amendment, which it might be competent for the Court below to make on proper terms.

I incline to think that judgment should be given on the bill of exceptions for a *venire de novo*.

Mr. Justice WILLIAMS.—I am of opinion that, upon the whole record in this case, there ought to be a *venire de novo*, because I think the Judge's direction at the trial was erroneous, inasmuch as he told the jurors there was evidence for their consideration, on which they might find their verdict for the plaintiff on the issue raised on the plea of not guilty to the first count of the declaration.

It has not, I think, been sufficiently borne in mind, in the discussion of this case, what that first count is. It lays the possession of the goods in the insolvent, and the conversion before the insolvency. It is not, therefore, founded on any right of action which has accrued to the assignees, except by reason of their being entitled to the estate of the insolvent. If the right of action alleged in the first count ever existed at all, it existed at the time of the insolvency, and passed, together with the other choses in action of the insolvent, to his assignees, the plaintiffs, as part of his estate for the benefit of his creditors; and the only question is, whether such a right of action ever existed in the insolvent. I am of opinion that it never did, for the reasons I have already expressed in the Court below. The arguments at the bar of this House have not induced me to take at all a different view of the case, and I therefore think, I may not improperly refer your Lordships to that report, rather than occupy your time in repeating my reasons here.

Mr. Justice WIGHTMAN.—The defendant in error, an assignee of Benjamin Flint, an insolvent, sued the plaintiff in error, and in his declaration complained that the plaintiff in error before Flint became insolvent, converted to his own use, or wrongfully deprived the said Benjamin Flint of the use and possession of his goods. The plaintiff in error pleaded not guilty, and the point to be considered is in effect raised by that plea; the question being whether there was any evidence in the case of a wrongful conversion. [His Lordship stated the facts of the case.]

Upon this state of facts and dates, I do not see how the action can be sustained in its present form. The defendant in error founds his claim upon section 59 of the 1 & 2 Vict. c. 110 [reads the section]. At the time the warrant of attorney was given, it was not fraudulent or void as against anybody, certainly not against Flint, the insolvent, nor was it until after judgment had been entered up and execution issued, and the goods of the judgment-debtor taken and sold by the sheriff, that it became void as against the assignee of the insolvent. By the express terms of the Act, it is only void "as against the assignee," and as he has no title by relation farther back than the vesting order, I do not understand how he can recover in an action for converting to his own use, or wrongfully depriving Flint of the use and possession of his goods, the whole transaction being good as against Flint himself. I feel in this case all the difficulties that were suggested by Lord Wensleydale in the judgment which was delivered

by the late Mr. Justice Crowder, and in which judgment I entirely concur. It may be that the assignee might be entitled to succeed in a special action upon the case, or after a demand and refusal, but not in such an action as the present, in which the assignee proceeds as for a wrong done to the insolvent. The case of *Brook v. Mitchell*, 6 Bing. N. C. 349 (E. C. L. R. vol. 37), is a very strong, and as it appears to me, direct authority, to show that the present form of action is not adapted to the case of the assignee, and that he is not entitled to recover. Upon the whole, then, I am of opinion that the action in its present form is not maintainable, and that there should be a *venire de novo*.

Lord Chief Baron POLLOCK.—I entirely agree with the judgment pronounced in this case by Mr. Baron Martin in the Court of Exchequer Chamber, a copy of which is before your Lordships. The language of the statute is clear and explicit, that such a transaction "shall be deemed fraudulent and void," and it is thereby declared to be so "as against the assignee."

This is an inconvenient mode of legislation (which unhappily occurs too often in modern times), by which a thing is declared to be and is to be deemed to be what it *was* not and *is* not, but it is quite plain and intelligible; and although we may not approve of such a mode of obtaining the object of the legislature, there is no rule of construction which will enable us to put an interpretation upon it different from the plain meaning of the words used.

But as it is to be *void*, not *absolutely*, but *as against the assignees*, it would follow (from a well-known principle), that they are not bound to avail themselves of the statute, but may treat the transaction as valid if it be thought advisable to do so.

It seems to me that the more correct and safe interpretation of the statute is, that the transaction is void as against the assignees, unless by some act they affirm it, and not that it is voidable only, and they must do some act to make it void.

The consequence of this would be, that the assignees are entitled to maintain some action against the defendant.

But it is said they cannot sue in this form without first *making a demand*. If by that is meant that a demand is necessary, in order to declare their option to treat it as void, I have always expressed my view that such a demand is unnecessary for that purpose, because it is void unless they affirm it.

If the demand is said to be necessary in order to support the count in trover, the answer is that there has been an actual conversion, and therefore *no demand is necessary*; and I concur in the opinion of Mr. Baron Martin, that the declaration may well be read so as to sustain the claim of the plaintiff; and as your Lordships are bound to give judgment according to the very right as it appears on the whole record before you, I am of opinion that the plaintiff below is entitled to judgment.

August 3. The LORD CHANCELLOR (LORD CAMPBELL).—My Lords, I agree with the majority of the judges who, in answer to the question put to them by your Lordships, have expressed their opinion that this action cannot be maintained.

The only count in the declaration relied upon is in trover, alleging

a conversion in the time of the insolvent, and supposing that this conversion was wrongful as against him; but, by the statute on which the case of Billiter, the plaintiff, rests, the transaction is only made void "as against the assignee of the insolvent." Not a single allegation in this declaration is supported by the evidence; and in every action the plaintiff must succeed *secundum allegata et probata*. The only argument of the plaintiff is, that the warrant of attorney must be considered as if it never had any existence. But there are no words in the statute to work such an annihilation. The warrant of attorney existed, and was valid as to the insolvent when the conversion took place, and the alleged cause of action accrued.

But I by no means say that the assignee is without remedy; on the contrary, I am inclined to think that, by a declaration, properly framed, he might recover for the benefit of the creditors, the warrant of attorney being made void "as against the assignee."

A *venire de novo* must be awarded, as the judges have suggested, unless some arrangement may be made between the parties, to avoid the necessity of a new trial, which can have no object except with a view to costs.

LORD CRANWORTH.—It is not my intention to trouble your Lordships with more than a single observation, because I think the mere statement of the cause of action, on which alone there has been a verdict found for the plaintiff, is sufficient to show that the action cannot be sustained. The declaration is, that the defendant wrongfully deprived the insolvent of the use and possession of certain goods. Now, the only way in which the defendant deprived the insolvent of the use and possession of the goods is, that the insolvent delivered them over to him, and, therefore, the insolvent had no right to complain of the conversion. It appears to me that that really exhausts the whole subject. I may add that, perhaps, I should have thought it necessary to go fully into the case, were it not that I think that the whole view of the subject has been presented so clearly and forcibly in the judgment read by Mr. Justice Crowder in the Court of Exchequer Chamber,^(a) which is known to have been the judgment of my noble and learned friend^(b) opposite, while he was a member of the Court of Exchequer, that it would be useless to detain your Lordships merely by putting in other language that which is so well stated there.

LORD WENSLEYDALE.—A *venire de novo* must be awarded. I am quite satisfied that the judgment of the Court of Exchequer Chamber ought to be reversed. I have considered this subject a great deal, having heard it argued in the Court of Exchequer Chamber five years ago, when I was a member of that Court. The judgment which was read by Mr. Justice Crowder, and which I prepared, expressed my sentiments, which had been adopted after a full and careful consideration of the subject. On reconsidering the question, as I have done in the course of this argument, I do not think there is a single word that I could alter in that judgment. I am satisfied as to both parts of it; that the warrant of attorney was merely voidable, and that what was done under it could not be made the subject of this action

(a) 6 E. & B. 3 (E. C. L. R. vol. 88).

(b) Lord Wensleydale.

I beg, however, to express a doubt, and only a doubt, whether my noble and learned friend on the woolsack is right in saying that there could be any form of action in this case upon which the assignees could have redress, as no injury was done to them, and their remedy was to take the goods, supposing the warrant of attorney to be void.

LORD CHELMSFORD.—This case has been so fully considered in all its bearings in the Court below, and by the learned Judges who have assisted your Lordships, that I feel it necessary to state, only in a few words, the conclusion to which I have been led by a consideration of the various arguments urged in support of the different opinions which have been expressed.

The whole question resolves itself into a technical difficulty arising out of the form of action in the first count of the declaration. That count charges the defendant with converting to his own use, or wrongfully depriving Flint, the insolvent, of the use and possession of certain goods which it describes. I do not think that it is possible to read this count in the manner suggested by Mr. Baron Martin in the Court below, (a) viz.: "That the defendant, before Flint became an insolvent, converted to his own use, and wrongfully deprived Flint of the use and possession of the goods seized; and that the plaintiff, as assignee, was damaged by reason thereof," because this would not only be contrary to the obvious intention of the count, but to the case proposed to be made by the plaintiff, which is not founded upon any wrong done to the insolvent, but upon the avoidance, by force of the statute, of the transaction as to the plaintiff, as assignee. The plaintiff can, therefore, only be entitled to recover under the count, as framed, by construing the words of the 59th section of the 1 & 2 Vict. c. 110, "fraudulent and void as against the assignees," as if they were "fraudulent and void" absolutely. But we must suppose that the qualifying words were intended to have some meaning; and no other can reasonably be assigned to them than that, as to all other persons but the assignees, the transactions mentioned in this section are good and valid. The consequence of this is, that no right existed in the insolvent, or in any one else, to impeach the transaction until the vesting order of the Insolvent Court; and that no right of action passed to the assignee as part of the insolvent's estate. On the appointment of the plaintiff as assignee, a right immediately arose, by force of the statute, but only available from that moment, and having no relation back to the time when the transaction took place. If a question arose upon the Statute of Limitations, could it fairly be doubted that the time would begin to run from the appointment of the assignee, and not from the period of the supposed conversion of the goods of the insolvent?

Upon the short ground, therefore, that the first count charges a conversion complete in the time of the insolvent, and that the assignee has placed his right of action upon this conversion alone, I think that the judgment of the Court of Exchequer Chamber is wrong, and that it ought to be reversed.

LORD BROUGHAM entirely concurred.

LORD WENSLEYDALE.—There will be a *venire de novo*.

Mr. Harcourt.—With reference to that point, I should wish to ask

(a) 6 E. & B. 20 (E. C. L. R. vol. 88).

your Lordships, whether it is competent to me now to abandon my bill of exceptions and the plea of "not guilty," and to ask, upon the fourth plea, and the replication to it, to have the judgment reversed, and a verdict entered for the defendant.

LORD WENSLEYDALE.—*Non obstante veredicto?*

Mr. *Harcourt*.—It would be upon the face of the record. What I submit is, whether, if I abandon the bill of exceptions and the plea of "not guilty," I should be entitled to have judgment entered for the defendant upon the special pleading. I do not know whether your Lordships will think that it is competent to me now to make that application.

Mr. *Bovill*.—With reference to that question, your Lordships see that the case has come here upon the bill of exceptions, and the judgment of the Exchequer Chamber has proceeded upon the bill of exceptions.

Mr. *Harcourt*.—I argued the question before your Lordships altogether upon the special pleading.

The LORD CHANCELLOR.—This high Court, along with the inferior Courts, has always ample power of amending and directing the form of the pleadings to gain the ends of justice, but I doubt very much whether what is suggested can be done.

LORD CRANWORTH.—It had not escaped the attention of the Lords who heard the case, because we have very much considered that point, but I am afraid that we have no power to do it.

Mr. *Harcourt*.—I thought that under the Common Law Procedure Act, which altered the practice with respect to writs of error to this House, there was a power of directing that the judgment should be in any form that the House might think fit. Your Lordships will remember that the argument before you proceeded upon the special pleading, not upon the issue of "not guilty."

LORD CHELMSFORD.—We are all of us anxious that it should be done if possible, but I am afraid that it cannot be done.

The LORD CHANCELLOR.—It must be understood that the judgment of the House will be for a *venire de novo*, unless you can come to some arrangement, which I should think would be quite practicable.

Mr. *Bovill*.—I should think that will be the result. Indeed the case almost necessarily resolves itself into that.

LORD BROUGHAM.—In the mean time it is a simple reversal.

The LORD CHANCELLOR.—*A venire de novo nisi.*

LORD WENSLEYDALE.—What I recommended in the Court below was, that "the judgment should be reversed and a *venire de novo* awarded, unless the parties would agree to strike out the plea of 'not guilty' to the first count," on such terms as might be arranged, "and then the judgment should be reversed and given for the defendant on the special pleading, *non obstante veredicto.*"

Judgment reversed. *Venire de novo* awarded.

HENRY ROWBOTHAM, and Others, Plaintiffs in Error, v. WILLIAM WILSON, Defendant in Error. June 8, 11, 19.(a)

Prima facie, the owner of land is entitled to the surface itself, and all below it, *ex jure nature*; those who seek to derogate from that right must do so by virtue of some grant or conveyance.

The rights of the grantee of the minerals depend on the term of the deed by which they are conveyed. Under a grant of minerals, a power to get them is a necessary incident.

In 1770 a private Act of Parliament was passed to provide for the allotment of commons and commonable lands, &c. These lands were described as having mines under the surface. Commissioners were appointed to allot (having due regard to the mines) according to the rights of the various persons interested in the lands, some of which were divided into small parcels. The Commissioners, by their award, allotted the lands, so that some of the mines allotted to A. were situated under portions of the land allotted to B. The persons interested executed this award, which (reciting that this mode of allotment had been necessary) contained a clause, declaring that the proprietors agreed with each other, and their heirs, that the lands so allotted should be lawfully held and enjoyed by the allottees without molestation, and without any mine owner being subject to any action for damages on account of working and getting the mines, or by reason that the lands might be "rendered uneven and less commodious to the occupiers thereof, or by sinking in hollows, and being otherwise defaced and injured where such mines shall be worked . . . the several proprietors having agreed with each other, and being willing and desirous to accept their respective allotments in their several situations hereinbefore declared, subject to any inconvenience or encumbrance which may arise from the cause aforesaid." The mines were worked by A., his assignee, and the surface of the land thereby (but without negligence) injured:

Held, that whatever is the general right in the surface to support, this clause in the award operated as a grant of a right to disturb the surface of the land, and B., therefore, could not maintain an action for damage on that account.

Qu. Whether this clause could operate as a release of the right to support?

The circumstance that (some years after the award, but many more than twenty years before the injury complained of) houses were erected on the land was held not to make any difference with regard to the relative rights of the parties under the award.

DANIEL ROWBOTHAM (since deceased, and now represented by the plaintiffs in error as his executors) was reversioner in fee, under mesne conveyances from one Samuel Pears, of certain ancient houses and surface land situated in the parish of Bedworth, in the county of Warwick. He brought an action against the defendant Wilson, who claimed as representative of one Henry Howlette, an allottee of coal mines, to recover damages for injury done to his land and houses by the working of those mines. By order of the Court of Queen's Bench, a case was stated. The case set forth that in the 9 Geo. 3.(b)

(a) 8 H. of L. 348.

(b) By that Act, c. ci., which recited that there were in the parish of Bedworth "certain common fields, common grounds, and commonable lands," of which certain persons therein named were owners, and that "the property in the lands, &c., lies intermixed and dispersed in small parcels," remote from the houses of the owners, which had been found inconvenient to them, it was stated that they were "desirous that the said lands and grounds may be specifically allotted amongst them in severalty, according to their respective rights and interests," Commissioners were appointed. They were authorized to make a survey and, "after the survey," to "divide, ascertain, and allot the said common fields, common grounds, and commonable lands and premises hereby intended to be enclosed," among the several persons "entitled to or interested therein, either in right of soil or in any other right or interest whatsoever . . . with a just regard to the quality, convenience, and contiguity of situation, as well as to the quantity of the lands to be assigned to each proprietor, and with a just regard to any mines or delphs or coal, lime, or stone supposed to be under the same, but subject, nevertheless, to the rules, orders, and directions by this Act prescribed," &c.

"And whereas there are lands supposed to have mines under them, and on that account the proprietors may be desirous of retaining their property therein, such of the lands of the proprietors as the Commissioners shall adjudge to have any valuable mines of coal, &c., under them, shall be allotted and set out together, by metes and bounds, in distinct lots,

an Act was passed for dividing and enclosing the common fields, &c., of Bedworth, in the county of Warwick, and Commissioners were appointed to carry that Act into effect. On the 21st June, 1770, the Commissioners made their award, by which (among other things) they allotted certain lands to one Henry Howlette. "And as to the mines on the estate of H. Howlette previous to the enclosure thereof, the same not having been requested to be set out by metes and bounds, we do assign, appoint, and allot unto the said H. Howlette, in lieu thereof, all the mines of coal and limestone under the several allotments of land before made to him; and also all the mines of coal under the allotments to Samuel Pears; and also all the mines of coal under the turnpike road, so far as the same ranges with the outlines of his allotment on Beasley's Furlong and Race Legs; and also all the mines of coal on another part of the turnpike road, contained between a line ranging with the north outline of the said estate, and a parallel line from the south of Sir Roger Newdigate's tenement in Colly Croft, for the breadth of 50 links, on the west side of the turnpike road against the allotment to Samuel Pears, and no more, the residue on the east, against the house of Samuel Pears and Daniel Jackson, being allotted to the said Samuel Pears." And the Commissioners allotted to Pears "all the mines of coal under that part of the turnpike road contained between a line ranging with the south outline of his own home close, and a parallel line drawn from the south end of Sir Roger Newdigate's tenement, opposite to houses of the said Samuel Pears and Daniel Jackson, all situate in Colly Croft aforesaid, for the breadth of 35 links on the east side thereof adjoining to the homestead of the said Samuel Pears," which the Commissioners adjudged to be equal in value to the mines he was previously possessed of, without being entitled to any part of the mines under his own allotment of land, which last-mentioned mines were thereby allotted to H. Howlette. The award contained the following clause: "And whereas, in order to preserve the convenience of situation of the allotments to the several proprietors interested in the said enclosure and division, it hath been found necessary in some cases to assign the mines under the whole of some particular allotments, and in other

unto or for such of the proprietors respectively as shall desire the same, provided such desire shall be signified by writing, &c.; or otherwise that there shall be set out for such proprietors other lands under which there shall be supposed to lie mines of equal value to those which they were respectively possessed of before the passing of this Act; and the said Commissioners, in allotting the said mine lands, shall make just allowances between such of them, the delphs whereof remain entire and unbroken, and such of them which have heretofore been open and in part worked."

"When the said Commissioners shall have completed and finished the partitions and allotments of the said open and common fields, common grounds, commonable lands and premises, according to the tenor, true intent, and meaning of this Act, they shall draw up an award, which shall express the quantity of acres, &c., contained in the said common fields, common grounds, commonable lands and premises so intended to be enclosed, and the quantity of each and every part which shall be assigned and allotted to the several parties entitled to and interested in the same, and a description of the situation, buttals, and boundaries of such parcels and allotments respectively, and proper orders and directions for the fencing, &c., and also for making and laying out proper roads, &c., through the same, and such other orders, &c., as shall be necessary, conformable to the tenor and purport of this Act."

The new allotments were to be in bar of old estates, "right of soil, right of common, and other rights, interests, and properties whatsoever in, over, and upon the said common fields," &c.

cases part of such mines to different persons than those to whom the allotments of the surface land are awarded, and the several proprietors parties to this award are the only persons interested in the disposal of land and mines under such circumstances, which said proprietors, parties hereto, do by their sealing and executing these presents,^(a) testify their acceptance of their respective allotments in manner as the same are allotted to them as aforesaid, and do for themselves severally and respectively, and for their several and respective heirs, executors, administrators, successors, and assigns, utterly disclaim, release, and disavow all right, title, interest, claim, and demand, of, in, or to any of the mines under their several allotments, except such or such part thereof only as are hereinbefore particularly mentioned and described to be allotted to each of them; and the same proprietors do hereby for themselves severally and respectively, for their several and respective heirs, executors, administrators, successors, and assigns, covenant, promise, and agree, to and with each other, and the heirs, executors, administrators, successors, and assigns of each other, that the said mines so allotted under the circumstances aforesaid, shall or lawfully may for ever after be held and enjoyed by the respective persons to whom the same are assigned according to the true intent and meaning of this award, and by them and every of them be worked and gotten accordingly, without any molestation, denial, or interruption of any other person or persons parties to these presents, and those claiming under them respectively, who for the time being are or may be owner or owners of the surface of the lands under which such mines are situate, and without being subject or liable to any action or actions for damage on account of working and getting the said mines, for or by reason that the surface of the lands aforesaid may be rendered uneven and less commodious to the occupiers thereof, by sinking in hollows or being otherwise defaced and injured where such mines shall be worked, the said several proprietors, parties to these presents and interested in the disposal of lands and mines under the circumstances aforesaid, having agreed with each other and being willing and desirous to accept their respective allotments in their several situations hereinbefore declared, subject nevertheless to any inconvenience or encumbrance which may arise from the cause aforesaid, so nevertheless as that nothing herein contained shall extend or be construed to extend to authorize or enable any of the parties for the time being entitled to the said mines, to sink pits on allotments under which the same are situate, for the purpose of working the said mines, without the consent of the then owners of the surface of the same allotments previously obtained, or in any manner to dig or break the said surface without the like consent." The houses which the plaintiff alleged to have been injured had not been erected till after the award, but were more than 20 years old at the time of committing the grievances. The case stated that the mines had been worked with care and skill, and without negligence.

On the 7th June, 1856, the Court gave judgment for the defendant,^(b) which judgment was, on the 14th July, 1857, affirmed by the

^(a) The proprietors of land generally executed this award. Pears did so, but Howlett did not.

^(b) 6 E. & B. 593 (E. C. L. R. vol. 88).

Court of Exchequer Chamber.(a) The present proceeding in error was then taken.

Mr. Sergeant *Hayes* and Mr. *Spinks*, for the plaintiff in error.—Some of the Judges in the Court below were of opinion that there was no express nor implied authority to do what was done here. That is one of the questions now raised. The authority of the Commissioners depended entirely on the Act of Parliament. They were bound strictly to follow the Act; they have not done so, for they had no authority to separate the allotments of the lands from the mines below them, and to give to the allottee of the mines a right to work them so as to injure the surface of the land. By so doing they exceeded their authority, and therefore their award is bad: *Casamajor v. Strode*, 2 Myl. & Keene 706, the *King v. Wastbrook*, 4 B. & C. 732 (E. C. L. R. vol. 10).

It is contended on the other side that the clause in the award is a covenant. Even if so, the defendant cannot take advantage of it. The plaintiff's predecessor executed it; the defendant's predecessor did not; he was, therefore, at liberty to contest the award till the lapse of 20 years had made it valid. He merely accepted the land and the title to that land which the award gave him, and nothing but what the law necessarily implies will follow such an acceptance. The supposed covenant will not bind the present possessor; it is a mere personal covenant which does not run with the land, but is a mere covenant, as in *Keppell v. Bailey*, 2 Myl. & Keene 517, not to do a certain thing; it is a covenant not to sue, and it is binding only on the parties who mutually executed it. It does not bind the assignee of the covenantor: *Spencer's case*, 1 Smith's Leading Cases 30, and the notes, 59–63.

Nor is this clause in the award a grant of the right to work the mines, and to work them even though such working may injure the surface of the land. In the first place, there are no words of grant in the award.

[Lord WENSLEYDALE.—There are no particular words necessary for that purpose.]

In the next, such a grant is void, for it is destructive of the thing itself, the land, out of which the grant is supposed to be made. Besides, at the time of executing the award, Pears had no estate in the allotments, and so had no power to make them the subject of a grant; nor at that time had Howlette any estate in them, nor did he execute the award. There can, therefore, be no estoppel here, for an estoppel must be mutual.

[Lord WENSLEYDALE.—Pears took possession under the award, and by it entered into a covenant. That operates as a grant.]

If a man has no interest he cannot make a grant; though he may bind his future interests by positive stipulations, still they will not amount to a grant. Is there anything here granted, and is there any grantor? Assuming, for the sake of argument, that the award is good, Pears had only a title to the surface, and with it a right to the support of the adjacent strata. That right is not in itself grantable, for it is an inseparable incident to the land, and, therefore, cannot be granted away from it. *Sheppard's Touchstone*, c. 12, p. 239. There was, therefore, nothing to grant.

(a) 8 E. & B. 123 (E. C. L. R. vol. 92).

It is a settled principle of law that a man is entitled, *ex jure naturæ*, to support for his land from anything below the surface, from the subjacent strata, and also from the adjoining land.

[Lord WENSLEYDALE.—In all such cases, the origin of the right is supposed to be in a grant made when the lands which had belonged to one proprietor were by him divided between two or more other persons.]

The case of *Humphries v. Brogden*, 12 Q. B. 739 (E. C. L. R. vol. 64), is upon this point decisive in favour of the plaintiff. It was there held that of common right the owner of the surface is entitled to the support of the subjacent strata, and that if the owner of the minerals removes them, it is his duty to leave sufficient support for the surface in its natural state. This right of the surface to support is not a mere easement, which is something accessorial to the land, but is one of the ordinary common law rights of property. It is said by Mr. Justice Erle, in *Bonomi v. Backhouse*, E. B. & E. 642 (E. C. L. R. vol. 96), (a) that "the right to support is one of the ordinary rights of property, analogous to the right to a natural stream incidental to all land, and not an easement or right acquired by grant or otherwise;" and that opinion was adopted in the judgment of the Court of Exchequer Chamber. (b) As to the construction of the alleged covenant, it is clear that it was not a release of a right of action, for no cause of action had then arisen or might ever arise. It was the intention of the Commissioners that Pears, in taking the surface, took it with this natural right to support; the clause to prevent him from suing, which is so much relied on by the other side for another purpose, proves that intention, since it acknowledges that, without a covenant not to sue, he would have had the right to sue, if by the act of the mine owner the support to his land was taken away.

Finally: the houses erected by the plaintiff have acquired by lapse of time a title to support.

Mr. *M. Smith* and Mr. *Field*, for the defendant in error.—The right of support here contended for is not a natural right applicable at all times and in all cases. *Humphries v. Brogden*, 12 Q. B. 739 (E. C. L. R. vol. 64), does not lay down that proposition. In this very case, Lord Campbell, referring to that decision, said, (c) "We there expressly guarded ourselves against the supposition that we intended to lay down any rule applicable to a case where the *primâ facie* rights and liabilities of the owner of the surface of the land, and of the subjacent strata, are varied by the production of title deeds, or by other evidence." But whatever may be the right it has here been parted with. The presumption here is, that as there is a grant of the mines, there is a grant of the right to use them. The agreement here is clear, and manifests the real intention of the parties, and they accept their allotments under the conditions, and liabilities, and covenants contained in the award. With the full knowledge that the surface would sink, they made this agreement. Putting the houses on the land afterwards cannot affect it. This is much more than a mere covenant not to sue.

[Lord BROUGHAM.—Suppose it a renunciation of the right to sup-

(a) Now on error in this House.

(b) E. B. & E. 654 (E. C. L. R. vol. 96).

(c) 6 E. & B. 602 (E. C. L. R. vol. 88).

port necessary to preserve evenness in the surface, so far as the ordinary use of land for gardening purposes, for instance, would require; does that imply a like renunciation for building purposes? In the former the injury might be inconvenient, in the latter it might be fatal.]

That depends on the intention of the parties, as manifested in the deed. A man may grant away the beneficial use of the surface of his land. He may grant a right of way over his land, and he may grant such a right as this, and he may do so, either by grant or release: Sheppard's Touchstone, p. 82. It is not important that the word grant is not used, it being the intention of the parties that such should be the effect of the instrument, *Goodtitle v. Bailey*, Cowp. 597, *Denison v. Holliday*, 1 H. & N. 631, 3 Id. 670, and though the words are words of agreement only, yet if such is the intention of the parties, they may operate as a grant: *Gale on Easements*, p. 46, (a), *Northam v. Hurley*, 7 Mer. & Wels. 63, (b) Words which in themselves appear to be only words of reservation, may operate as a grant: *Wickham v. Hawker*, 1 E. & B. 665 (E. C. L. R. vol. 72). A deed of conveyance may operate as a covenant to stand seised to uses: *Roe v. Tranmer*, 2 Wils. 75.

Here was an Act of Parliament dealing with many small tenements. The Commissioners had authority to grant mines, and also to grant the power to work them, but if so, they had authority to grant what was reasonable and necessary for the exercise of that power. A grant of this kind was reasonable, and therefore must be held good: *Rogers v. Taylor*, 1 H. & N. 706. Some of these tenements consisted only of a quarter of an acre of land. If the Commissioners had no power to disannex the mines from the surface, there would be an end of the power they undoubtedly possessed to grant the right to work the mines, for it might be impossible for each owner of a small portion of surface land to sink shafts, and work the mines under his land. It must therefore have been the intention of the Legislature that the Commissioners should have the power to do what they have done. The very necessity of the thing showed that the Legislature intended to give them this power.

The case of *Keppell v. Bailey*, 2 Myl. & K. 517, does not apply here, for this is a grant of something arising out of the land itself, and inseparably connected with it, while there it was only a personal covenant to employ the produce of the land in a certain manner.

Mr. Serjeant *Hayes* replied.

Lord WENSLEYDALE, after stating the facts, said:—The question turns upon the construction of the Act of Parliament, and the award made under it.

It is stated in the case, that the parcels to be allotted were very small, and that the surface of the land was allotted to one set of proprietors, and the coals below to another set. Then there is executed a covenant by all the parties to the award. (His Lordship read it. See ante, 753.)

The Court of Queen's Bench was of opinion upon this case, that the plaintiff was without remedy, and that the defendant was entitled

(a) Quoting *Holms v. Seller*, 3 Lev. 305. See *Allan v. Gomini*, 3 Per. & D. 531.

(b) See *Ewart v. Graham*, 7 H. L. Cas. 331.

to judgment. A writ of error was brought to the Court of Exchequer Chamber; the learned Judges there were divided in opinion, the majority affirming the judgment of the Court of Queen's Bench; the minority consisted of Mr. Justice Cresswell and Mr. Baron Watson, who were of opinion that this was merely a covenant, and that as a covenant it could not operate as a grant, and also that as a covenant it could not operate as a release of damages, because damage had not been sustained.

I am of opinion that the judgment of the Court of Exchequer Chamber affirming that of the Court of Queen's Bench is right, and I advise your Lordships to affirm it.

It is unnecessary to discuss several of the questions made in the elaborate arguments at your Lordships' bar.

Whether the right to the support given by the land below to the land of the owner of the surface, when the strata belong to different persons, is properly to be called "an easement," as it is by Mr. Gale in his excellent Treatise on Easements a "natural easement," or whether it is to be termed a "right" *ex jure naturæ* to that support, or whether the owner of the surface has merely a right to enjoy his own land in its natural state and condition, with a right of action against the owner of the land adjoining or subjacent, when the act of his neighbour does him an injury, are questions immaterial, as it appears to me, to the decision of this case; though the last proposition appears to be fully established by the judgment of the Court of Exchequer Chamber in the case of *Bonomi v. Backhouse*, E. B. & E. 622, 646 (E. C. L. R. vol. 96). And it was held, therefore, that the Statute of Limitations does not begin to run until the damage is sustained.

There is no doubt that *primâ facie* the owner of the surface is entitled to the surface itself and all below it *ex jure naturæ*; and those who claim the property in the minerals below, or any interest in them, must do so by some grant from or conveyance by him, or it may be from the Crown, as suggested by Lord Campbell in the case of *Humphries v. Brogden*, 12 Q. B. 139 (E. C. L. R. vol. 64).

The rights of the grantee to the minerals, by whomsoever granted, must depend upon the terms of the deed by which they are conveyed or reserved when the surface is conveyed. *Primâ facie*, it must be presumed that the minerals are to be enjoyed, and, therefore, that a power to get them must also be granted or reserved, as a necessary incident. It is one of the cases put by Sheppard (*Touchstone* 5 chap. 89), in illustration of the maxim, "*Quando aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit*," that, by grant of mines is granted the power to dig them. A similar presumption, *primâ facie*, arises, that the owner of the mines is not to injure the owner of the soil above by getting them, if it can be avoided.

But it rarely happens that these mutual rights are not precisely ascertained and settled by the deed by which the right to the mines is acquired; and, then, the only question would be as to the construction of that deed, which may vary in each case. The question to be decided in this case is, what sort of right the defendant had upon the facts stated in the case reserved, to get and take away the coals under the plaintiffs' land.

The origin of the plaintiffs' right to the land, and of the defend

ant's right to get the coals is the award made, in 1770, under the Private Enclosure Act for the Common Fields of Bedworth. A larger extent of surface, no doubt, was given to the allottee of the surface, as the compensation for the minerals not being given to him. It is clear that the persons under whom the plaintiff and defendant respectively claim, took with full knowledge that the one was intended to have a very large power of working the mines, and the other was to have the surface, subject to that power, and that each of the parties to the suit had notice of their respective titles by the award itself. The plaintiffs' case is therefore not a very equitable one; but the question still is, whether that power and limitation were legally annexed to the respective rights or not.

I am clearly of opinion that they were, whether the award be considered valid or not.

The objection to the validity of the award is, that the Commissioners had no power to separate, in any case, the minerals from the surface. If they had the power (and I think they had), then the award of the surface of the particular allotment to Pears, and of the coal under it to Howlette, was valid; and, of necessity, the Commissioners could give to the latter, for the enjoyment of his allotment, the power to get the coal. They have done so by their award; and though Pears is made to covenant, at the same time, as to the manner in which the power is to be exercised, it is the act of the Commissioners also, for it is evident that they intended it to be done, and no precise words are necessary. It may be that they doubted of their powers, and so added the covenant.

On the supposition, therefore, that the award is valid, Howlette obtained the right to get the coal in a manner which would render the surface uneven and less commodious to the occupier. And supposing this power is not to be considered as given by the act of the Commissioners, but only by the contract of the parties, Pears' covenant, he being seised in fee by virtue of the award, would certainly operate as a grant, by him, to Howlette (who, at the same instant, took the fee simple in the mines), of the power to get the minerals and to disturb the surface of his own land for that purpose by winning the mines below from some adjoining land or bed of coal.

I do not feel any doubt that this was the proper subject of a grant, as it affected the land of the grantor; it was a grant of the right to disturb the soil from below, and to alter the position of the surface, and is analogous to the grant of a right to damage the surface by a way over it; and it was admitted, at your Lordships' bar, that there is no authority to the contrary. It is undoubted law, that no particular words are necessary to a grant; and any words which clearly show the intention to give an easement which is by law grantable, are sufficient to effect that purpose.

If the words could only be read as amounting to a covenant, it must be admitted that such a covenant would not affect the land in the hands of the assignee of the covenantor; but if they amount to a grant, the grant would be unquestionably good, and bind the subsequent owners of the surface. Therefore, if the award be valid, the plaintiff, as assignee of the surface, would be bound either by the order of the Commissioners, or by the grant.

The reason why I think the Commissioners had the power to allot the surface to one, and the mines below to another, is because the words of the Act do not necessarily limit the division into allotments of the whole interest in the land, in separate entire portions of the surface and minerals together. There is nothing inconsistent with the terms of the Act in allotting the surface in some portions of land to one, and the minerals under those portions to another. The Act of Parliament recites, that the property lies intermixed and dispersed in small parcels, and small parcels would have, probably, to be assigned to each proprietor; and it might be, as was suggested by Mr. Field, in his able argument at the bar, out of question for each owner to win the coals under his own allotment by sinking a shaft in it, and it would be most convenient for all parties to have the coals assigned in such cases to a neighbouring proprietor, and more of the surface given to the owner, whose coal was taken away. The private Act of Parliament is really no more than an agreement between the parties to it, sanctioned by the Legislature; and, in order to construe that agreement, we may look at the surrounding circumstances at the date of it. Add to this, the Act and award having been acted upon for ninety years, every intendment must be made which would give it validity.

These considerations lead me to the opinion that the Commissioners had the power, for the general convenience, which they believed they had, and which they exercised, to give portions of the surface to one person, and the mines under each portion to another, and that the award, therefore, is valid.

The opinion, however, of the majority of the Judges in the Courts below, seems to have been that the award was bad. But supposing that to be so, and that Pears did not take a legal right to the land, nor Howlette a legal title to the mines by the award, I still think that the defendant is entitled to the verdict and judgment.

It might, perhaps, be enough to say, that after ninety years' enjoyment a legal right to the surface land ought to be presumed in those under whom the plaintiff claims; and also, a legal right to the minerals below, with a right to get them, by a legal grant, in those under whom the defendant claims; and if there was such a right, on the finding in the case, it could not be exercised without rendering the surface uneven, from the peculiar nature of the coal, and the incapability to support the land above by artificial means. The right to get, involved therefore, of necessity, the right to withdraw a certain quantity of support from the land above, and so to do all the damage which has been done, for it is found that the defendant's workings were carried on with care and skill, and without any negligence.

I do not think, however, that it is necessary to have recourse to this presumption. If the Commissioners had no power to award the surface to one person and the minerals to another, it would follow that the award was totally void; but Pears would be still bound by the deed which he executed, which would operate as a grant of the right to win the coals in such a manner as might injure the superjacent land. He would not be estopped from saying that he was not at the time the owner of the surface, because his defect of title appeared upon the same instrument, and so the estoppel would be avoided, and he would be in the same situation as if, without any legal right but at

the same time fully believing that he had it, he had executed to another person, a grant of a right to get the minerals under a particular close, and so to disturb the soil of that close, and had afterwards acquired the legal title to that close. This acquisition would operate by feeding the estoppel and making it obligatory from that time, and operate as a grant of an interest in the land: *Trevivan v. Laurence*, 6 Mod. 258. Now it is quite clear that after a lapse of twenty years, a good title was obtained from that time, and from thence, I think, the grant had full operation, and authorized all that the defendant did in getting the coals.

It may be proper to add that if the plaintiff had a right, properly so called, to the support of the minerals, as an easement or *ex jure naturæ*, the covenant might operate as a release of that right. But that notion is at variance with the law laid down in *Bonomi v. Backhouse*, E. B. & E. 642 (E. C. L. R. vol. 96), above cited, and which I think is perfectly right. Feeling assured that the covenant operates as a grant of a right to disturb the surface, it is enough to decide the case on that ground.

The circumstance of the plaintiff having afterwards built houses upon the allotment which was subject to this power, makes no difference in this case; therefore, I think, the defendant was entitled to judgment. I should add that Lord Brougham, who heard the case, is unavoidably absent; but he authorizes me to say that he entirely concurs in the view which I have taken of this case.

Lord CHELMSFORD, after stating the pleadings, said:—From the facts in the special case stated by consent, it appears that the defendant's mines have always been worked without any negligence on his part, and according to the course and practice of mining in the county, and that he left pillars composed of the refuse called "lamb and slack," according to such course and practice. The case also states, that "no natural or artificial pillars *would prevent* the accrual of the injuries now complained of, which have arisen from the natural subsidence of the surface soil on getting the mine according to the use and practice of the county and neighbourhood." This is not very clearly expressed, but I suppose the meaning to be that no natural or artificial pillars *would have prevented* the accrual of the injuries complained of. It cannot be intended to allege (what it seems to import) that the mines could not have been worked in any manner without necessarily occasioning the subsidence of the surface land.

The plaintiff and defendant, or those from whom they claim, have been respectively in possession, the one of the surface land, the other of the mines beneath, from the time of an award made in the year 1770, under the Enclosure Act. By this award the Commissioners divided the surface land from the mines, and allotted the former to Samuel Pears, from whom the plaintiff derives his title, and the mines beneath to one Henry Howlette, from whom the defendant claims.

The power of the Commissioners to make this separation of the mines from the surface land has been denied. But it is to be observed that the Act contains nothing which prohibits a division in this manner of the lands to be enclosed; and, as Mr. Field, on the part of the defendant, argued with great force, the Act deals with small parcels

of land in a mining district, where it might be extremely inconvenient that each proprietor (however small) should possess the mines within his allotment, and that the Legislature must be assumed to have intended that a division so much for the common benefit should be made, and therefore that an authority for the purpose must be implied. It is certain that the parties who signed and sealed the award never doubted the power of the Commissioners in this respect, and the respective allotments have been uninterruptedly enjoyed, without any question as to the title to them, until the present action was brought.

In the view which I take of the case, however, it is quite immaterial whether the award is valid or not, because upon either supposition there will still exist the covenant of Pears, which will be available at all events to prevent the action being maintained. This covenant is in terms much more than a covenant not to sue, for Pears expressly declares that he is "willing and desirous to accept his allotment, subject to any inconvenience or encumbrance which may arise from working and getting the mines." The word "encumbrance" (though not a happily chosen word for the purpose), I understand to mean, any "obstruction" or "impediment" to the use of the surface land. The covenantee, according to the well-known rule in the construction of deeds, is entitled to render this covenant available in any manner in which it will answer the intended object. The construction adopted by the Judges, whose judgments were in favour of the defendant, is, that it may be used as a grant; and I think that, when the subject-matter of the grant is correctly understood, this is the correct view. It must be borne in mind that Pears had no right, either by the award or as attached to his ownership, which was capable of being granted and transferred to another. It was a right, inherent in the land, to support from the subjacent land, which of course would pass with the land itself, but which could not possess a separate existence.

I was disposed to think that it was a right which might be relinquished to the owner of the mine, and that the covenant might therefore be used as a release. But I am satisfied that the view taken by my noble and learned friend, Lord Wensleydale, founded upon the nature of the right as explained in the case of *Bonomi v. Backhouse*, is correct, and that it is not such a right as can be the subject of a release. But although the thing itself, namely, the right to support, cannot pass by grant, nor be extinguished by release, yet the covenant amounts to a grant of license to do acts which may be completely destructive of that right, and being by deed, and therefore presumed to be founded upon good and sufficient consideration, it is irrevocable and binding upon all who claim the surface land from Pears. The effect of Pears' deed is, not to transfer to Howlette any right or interest in the coal which might serve as a support to the surface land, but it operates as the grant of a right to Howlette, his heirs and assigns, to work the mines without molestation, denial, or interruption, even to the taking away this support, and defacing and injuring the surface of the land, which, without such a grant, could not lawfully have been done.

For these reasons I agree with my noble and learned friends that the judgment of the Exchequer Chamber is right, and ought to be affirmed.

Lord KINGSDOWN.—I quite concur in the judgment which has been given.

The LORD CHANCELLOR (Lord CAMPBELL).—My Lords, having been prevented by public business elsewhere from hearing the argument in this case, of course I give no opinion. I may perhaps, observe, that the judgment now given being in accordance with that of the Court over which I formerly presided, I entirely concur in it.

Judgment affirmed with costs.

The OFFICIAL MANAGER of the PHOENIX LIFE ASSURANCE COMPANY, Plaintiff in Error, v. H. B. SHERIDAN, Defendant in Error.(a) Aug. 13.

S. effected an insurance on the life of B. The policy was headed with these words "Annual premium, 33*l.* whole term, payable by quarterly instalments of 8*l.* 5*s.* each." The policy was dated 2d August, 1856, and recited that "the assured had paid 8*l.* 5*s.* as the premium until 2d November." It then witnessed that "if B. shall die within twelve calendar months from the date hereof, or shall live beyond such period, and the assured shall on or before that period, or before the expiration of every succeeding twelve calendar months, pay the amount of premium," &c., the insurers should be liable; provided, "that if B. shall die before the whole of the quarterly payments shall have become payable for the year, the directors may deduct from the sum insured the whole of the premiums for that year, reckoning it to commence from the 2d of August." B. died after the third quarterly instalment had become payable, but before it was paid. In an action on the policy, the defendant pleaded that the non-payment of this third instalment rendered the policy void:

Held, that the plea was an answer to the action.

THIS was an action on a life policy. Sheridan, on behalf of "The Times Life and Guarantee Society," effected an Insurance with the Phoenix Company on the life of a person named Blomberg, resident at Berlin. The policy, which was dated 2d August, 1856, was headed thus:—"Sum assured, 1,000*l.* No. 3115. Annual premium 33*l.* whole term, payable by quarterly instalments of 8*l.* 5*s.* each," and it contained the following recitals and provisions: "Whereas the assured has paid to the company the sum of 8*l.* 5*s.* as the premium for the said insurance until the 2d day of November, 1856: Now this policy witnesseth, that if the said Blomberg shall die before the termination of twelve calendar months from the date hereof, or shall live beyond such period, and the assured, &c., shall on or before that period, or on or before the expiration of every succeeding twelve calendar months, provided Blomberg be still living, pay or cause to be paid at the office of the company the annual amount of premium, then the funds" of the company shall be liable. "Provided always, that if Blomberg shall happen to die before the whole of the said quarterly payments shall have become payable, under these presents, for the year in which he shall so die, it shall be lawful for the directors to deduct and retain from the said sum of 1,000*l.* so much as will be sufficient to pay and satisfy the whole of the said premiums of that year, reckoning the said year to commence from the 2d day of August." There was then a provision about Blomberg going abroad, or if he "shall die by duelling or by his own hand before he shall have been assured by the company fifteen months, and made two annual payments to the

company, this policy shall be void," &c. The declaration alleged the death of Blomberg, and the performance of all the conditions precedent to entitle the plaintiff to payment.

The defendant pleaded that Blomberg died within twelve calendar months from the date of the policy, and after the third of the quarterly instalments or payments of 8*l.* 5*s.*, each becoming payable according to the said policy, had become due; and at the time of his death, the third of the instalments was unpaid, and never was paid, although the defendant was ready and willing to renew the same when it became payable, and by the said non-payment the policy became lapsed and was void. Demurrer and joinder. In Easter Term, 1858, the Court of Queen's Bench gave judgment for the defendant, on the ground that this was a policy from quarter to quarter, leaving to the assured the liberty to drop it at the end of any quarter, and not imposing any continuing liability on the insurer, unless the quarterly payment is made at the end of the quarter; and farther, that the condition as to the payment of all the quarterly premiums was a condition precedent.^(a) The Exchequer Chamber reversed this judgment, on the ground that it was an annual insurance, for a year and from year to year, time being given to pay the annual premium by quarterly instalments; and that the absence of any express promise to pay, and of any provision as to the consequence of non-payment of the quarterly premiums, prevented their payment from being a condition precedent.^(b) This proceeding in error was then brought.

Mr. *Prentice*, for the plaintiff in error.—The question is, whether the quarterly payment of the 8*l.* 5*s.* is a condition precedent to the liability of the office. It is so, for the policy is a quarterly policy, and each quarterly payment must be made before the death of the life insured. The word "annual" in the policy is only descriptive of the whole amount of premium to be received within one year, but the provisions of the policy are all made in relation to the quarterly payments, and if they are not regularly kept up, the policy becomes void. The provision as to deducting the amount of unpaid premium from the sum insured, refers distinctly to a quarterly payment, then accruing but not actually due.

Mr. *Milward* and Mr. *Bushby*, for the defendant in error.—The construction on the other side cannot be maintained without striking out from the heading of the policy the word "annual" and substituting in the provision for payment the words "three calendar months" for "twelve calendar months." The policy is an annual policy, and the contract was created by the first payment, though, for reasons of convenience, that payment did not amount to the whole annual premium. It is not a contract which requires to be renewed from quarter to quarter, for had it been so, that would have been expressly stated, whereas the description at the head of the policy shows that the policy is annual, and that the division of payment into quarterly instalments, is merely a mode by which that annual payment is to be effected. An arrangement of that sort made for the convenience of one or other, or both of the parties, cannot affect the nature of the contract. On the failure to complete the payment of the annual premium when the whole of the annual premium had become due, the policy would be

(a) E. B. & E. 156 (E. C. L. R. vol. 96).

(b) Ibid. 160.

void, but it would not be so on the failure to pay any one of the intermediate quarters, for that would be to change the declared nature of the policy.

The LORD CHANCELLOR (Lord CAMPBELL).—In the construction of this very doubtful policy, I am sure that I should have been extremely ready to declare my opinion to be changed, if, upon hearing the arguments at the bar, and upon reading the judgment of the Lord Chief Baron in the Court of the Exchequer Chamber, and hearing the case argued ably and zealously, I had thought that the Judges of the Court of Queen's Bench had put a wrong construction upon it. But I adhere to the judgment which the Court of Queen's Bench gave. And my advice, therefore, is to reverse the judgment of the Court of Exchequer Chamber.

Lord CRANWORTH.—I have come to the same conclusion. When first I read the policy I was inclined to think that it might be construed as the Court of Exchequer Chamber construed it. But I now think, with as little doubt as can exist on the words of a policy so obscure as this, that the meaning is this: that if Blomberg shall die before the termination of twelve calendar months from the date thereof, or shall live beyond such period (that is providing for another contingency) and the assured shall on or before that period, while Blomberg is living, pay or cause to be paid the annual amount of premium, that is the annual amount of premium as is hereinbefore stipulated, that is, by four quarterly instalments, then the funds of the company shall be liable. But then this occurred to the framers of this policy, that Blomberg might die after one quarter only, and then they would have got only a quarter of the annual premium instead of the whole. Then to meet that, this proviso was introduced, that if Blomberg should happen to die before the whole of the said quarterly payments shall have become payable for the year in which he shall so die, it shall be lawful for the directors to deduct the amount of the subsequent quarters. That proviso was not meant to apply to the case of a default of payment, but to the case where the payments had been regularly made as they became due, but where all the instalments had not become due. That appears to me to be the proper construction, and it is in conformity with the decision of the Court of Queen's Bench. And, therefore, I think that the judgment of the Court of Exchequer Chamber ought to be reversed.

Lord CHELMSFORD.—My Lords, I agree with my noble and learned friends in the conclusion at which they have arrived. I certainly, like my noble and learned friend near me, for some considerable time was of opinion that the Court of Exchequer Chamber had put the right construction upon this policy. But after careful consideration of the arguments which have been addressed to us, I am clearly of opinion that the conclusion at which the Court of Queen's Bench arrived is the correct one. I must say at the same time, that I do not agree with those who think that it is a policy, from quarter to quarter. I think it is an annual policy, but it is an annual policy of which the premium is payable by quarterly instalments. Then the nature of the contract, as I gather from the operative words of the policy, is that "if Blomberg shall die before the termination of twelve calendar months," and if he "shall on or before that period pay or cause to be

paid the annual amount of premium," then the policy shall be paid. Now what is the meaning of those words "the annual amount of premium." Why, "the annual amount of premium" according to the stipulations of the policy, that is "the annual amount of premium" payable by quarterly instalments. Therefore as the quarterly instalments become due, he must pay the quarterly instalment which is due. But of course he does not pay quarterly the annual amount of premium which entitles him to the benefit of his assurance. And reading it in that way, then the policy is perfectly consistent, though I acknowledge that for some time I had some little difficulty as to the construction at which I have ultimately arrived. The policy, artificially and strangely as it is drawn altogether, is, in some degree, in the most important parts of it, rendered consistent in this way of viewing it. Because then, as my noble and learned friend puts it, this proviso with regard to Blomberg dying before the whole of the quarterly payments shall have become payable, does not provide for the case of default of payment, but it provides for the case of the party dying after having paid regularly the quarterly instalments which had become due previously to his death, but before others had become due; giving undoubtedly to the insurers that which it was intended they should receive, namely, the whole of the annual premium, or allowing them to deduct the quarterly instalments, which had not become payable, out of the money which would be paid for the assurance.

This appears to me to render the whole policy perfectly consistent. And therefore I think that the judgment of the Court of Exchequer Chamber was erroneous, and ought to be reversed.

Lord KINGSDOWN.—My Lords, I am of the same opinion.

Judgment of Exchequer Chamber reversed.

JOSEPH SOMES and Others, Plaintiffs in Error, v. The DIRECTORS OF THE BRITISH EMPIRE SHIPPING COMPANY.
Defendants in Error.(a) *May 22.*

A person who has a lien upon a chattel for a debt cannot, if he keeps it enforce payment, add, to the amount for which the lien exists, a charge for keeping the chattel till the debt is paid.

Where such a charge is made, and the owner of the chattel gives notice that he will pay it, but that he protests against the payment, and will seek to recover it back again, he may maintain an action for money had and received for such a purpose.

A shipowner desired to have his ship repaired. On asking a shipwright for an estimate, he received one, the last item of which was "The cost of use of graving dock for the job will be from 120 to 150 guineas." The ship was repaired. When finished, the account was sent in with this item included. No objection was made to this item, but time was required for payment. The shipwright who claimed and enforced his lien on the ship for payment, urged the removal of the ship, saying that it was unnecessarily occupying his dock, that he had other ships waiting to go in, and finally, that from a certain day he should charge 21l. a day for the use of the dock :

Held, these facts did not constitute an implied contract on the part of the shipowner to pay the additional charge, and that (having paid it under protest) he might maintain money had and received to recover it back.

MESSRS. SOMES, the plaintiffs in Error (defendants in the original action) were shipwrights, and were the owners of a graving dock used

for repairing ships. The company was possessed of several vessels, one of which, the "British Empire," was in need of extensive repairs. The directors, who were throughout represented by Mr. Wilson, the ship's husband, entered into a correspondence with Messrs. Somes, represented by their general manager, Mr. Preston, as to the terms on which the ship could be repaired. In a letter, dated 25th August, 1856, Mr. Preston stated the general cost of the required repairs, and added, "The cost of using the graving dock for the job will be from 120 to 150 guineas." . . . "The above prices subject to 7½ per cent. discount for cash, except dock dues." The ship was sent, and the repairs were completed. The account was sent in, but there was some difficulty in providing for the payment of it. Messrs. Somes refused to give up the ship except on payment. A correspondence arose on this subject. In a letter of the 15th November, 1856, Messrs. Somes said, "the whole work is now well nigh completed, and the ship is occupying our dock to no purpose; we must, therefore, beg the favour of an early settlement." A mortgage was proposed and prepared, but not executed. On the 25th November, they wrote again, "We also give you notice, that we shall charge the owners of the ship 21*l.* per day^(a) for the hire of our dry dock from the time our account was delivered up to the 20th instant." On the 27th November, Messrs. Cotterill, the attorneys for the company, wrote to say, that the letter of the 25th had been forwarded to them, and said, "We of course dispute Messrs. Somes' right to make any such claim, and we are instructed by the company to, and hereby give Messrs. Somes notice, that the company will hold them responsible for all damages consequent on the detention of the ship." Farther correspondence took place, and on the 18th December, Messrs. Cotterill, on behalf of the company, wrote to give notice, that "we are prepared to pay you whatever sum you demand, under protest, and for the sole purpose of obtaining possession and delivery of the said ship; and that the company will take such steps as may be advised to recover re-payment of such sum as may be so paid, or any part thereof, as also such damages as the said company may have sustained, or may hereafter sustain, by reason of your retention of and refusal to deliver up the said ship." The account thereon demanded amounted to 9,515*l.* 8*s.* 4*d.*, which, after discount taken off, was reduced to 8,816*l.* 15*s.* 2*d.* This sum comprised a charge of "Dock dues, 27th November to 29th December, 27 at 21*l.*, 567*l.*" The payment was made under a protest, repeating the words of the letter of the 22d December. The ship was actually given up to the agent of the directors on the 24th December. An action, in the form of money had and received, was, in accordance with the notice in the protest, brought against Messrs. Somes. The facts were stated in a case, and the Court was to have power to draw all such inferences of fact as to it might seem fit. In Trinity term, 1858, the Court of Queen's Bench gave judgment thereon for the plaintiffs.^(b) The defendants took the case into the Court of Exchequer Chamber, where the judgment was affirmed.^(c) Error was brought on this judgment to this House.

(a) The reasonableness of this sum, as a charge, if the company was liable to any, was admitted.

(b) 1 E. B. & E. 353 (E. C. L. R. vol. 96).

(c) *Id.* 357.

Mr. *Montagu Smith* and Mr. *T. Jones*, for the plaintiffs in error.—

First, there is here evidence of a contract to pay for the use of the dock. From the first, the respondents knew that there was to be a special charge of this sort. In the course of the correspondence, the letter of the 29th October, announced that in a few days the vessel would be fit to go out of dock, and on the 13th November Mr. Preston, on behalf of Messrs. *Somes*, wrote, "I have some ships now waiting for the large dock." On the 14th November, Mr. Wilson proposed that the ship should be allowed to go to the Victoria Docks, but as the terms on which that was to be allowed, could not be entertained by Messrs. *Somes*, their answer was that that could not be done, but they added, "The ship is occupying our dock to no purpose, we must therefore beg the favour of an early settlement."

The directors, therefore, had ample notice that the dock room was valuable, and that the occupation of it must constitute a subject of charge. The continued occupation of the dock was the fault of the shipowners. Their continuing to occupy it by leaving their vessel there must consequently be treated as putting them under the liability of paying for such occupation. And this becomes all the stronger from the distinct notice given in the letter of the 25th November that the charge would be 21*l.* a day; and in fact, that charge was begun to be made two days afterwards. The mere protest against the charge, when the person protesting does the very act which gives rise to the charge, amounts to nothing. It was a reasonable inference of fact that there was to be a payment for the use of the dock as long as the ship remained there. To make the shipwrights wrongdoers, the sum due for the work should have been tendered, and the ship demanded. [Lord WENSLEYDALE.—If a tailor makes a suit of clothes, the customer is to pay for them; but suppose he does not pay, and the tailor keeps them in the shop, is the customer to pay for their being kept there?] Yes, if the customer was informed from the first that the occupation of the shop by the clothes was the subject of a charge. The shipwrights had undoubtedly a lien on this vessel for payment for the repairs done: *Scarfe v. Morgan*, 4 Mee. & Wels. 270. It was the duty of the owners to take away the ship when the work was finished, and as they did not think fit to perform that duty, knowing at the same time that the occupation of the dock was a subject of charge, they must be deemed to have entered into an implied contract to pay that charge for whatever time they left the vessel unnecessarily occupying the dock. The payment is made under that implied contract, and it cannot be recovered back. Lord Campbell(a) said, that even supposing a wharfinger might claim a continuation of the warehouse rent during the time he detained goods in the exercise of his right of lien, still there could be no such claim here, "as there was to be no separate payment for the use of the dock while the ship was under repair." That was a complete mistake; there was a separate item mentioned in the very first estimate, in which it was said "the use of the graving dock would be from 120 to 150 guineas," and which was charged, and the charge not disputed, at 150*l.* That mistake being one main ground of the judgment, impeaches the judgment itself. If nothing else had been said there would from that estimate

(a) 1 E. B. & E. 365 (E. C. L. R. vol. 96).

alone have arisen a strong inference that the party using the dock, whether before or after the repairs had been completed, thereby entered into an implied assumpsit to pay for its use. An express consent to a charge is not necessary to raise an assumpsit; the law will imply it in many cases, as for instance, in the case of a husband for necessities supplied to the wife. Here, too, there was a responsibility on the party keeping the chattel to keep it in safety, and such a responsibility cannot exist without an accompanying title to compensation. In the *King v. Humphrey, M'Clcl. & Yo.* 178, such a claim as this was allowed even against the Crown.

Mr. *Bovill* and Mr. *Honyman*, for the defendants in error were not heard.

Lord CRANWORTH, after stating the case, said :—It was admitted, that although, where goods are delivered to have any work done upon them, and of course, among other things, a ship to have great repairs done upon it, the person doing those repairs has a lien upon the goods for the amount of the sum charged; but that is confined to a lien for the amount of that sum, and the party doing the repairs cannot add to that lien a charge for the use of his premises while keeping the goods (in this case the ship), not for the benefit of the shipowner, but for his own. It must be taken to be now decided, that at common law there is no right to such a demand; and the question, therefore, to be considered here is this: Do the letters which are in evidence, and which constitute part of the case, show that there was a special contract to give such a lien?

Now that is attempted to be deduced mainly from the letter of the 25th August, which gives a sort of rough estimate, and then states, "the cost of use of graving dock for the job will be from 120 to 150 guineas;" and farther, from a letter written on the 25th of November, after the repairs had been done, in which Messrs. *Somes*, the persons who had done the repairs, state, "We also give you notice, that we shall charge the owners of the ship 21*l.* per diem for the hire of our dry dock from the time our account was delivered." However, they modify that afterwards; they do not charge it from the time the account was delivered, but charge it from the time when this notice had been given.

It is admitted that that sum would not have been an unreasonable sum, if it was a matter in respect of which such a lien could be claimed; but, first, the Court of Queen's Bench unanimously, and afterwards the Court of Exchequer Chamber unanimously held, that there was no such contract to be inferred from anything that had passed between the parties; giving, however, no opinion as to what would have been the right of Messrs. *Somes* if they had claimed no lien, but had said to the owners of the ship when the repairs were completed, "Your ship is fit to be taken away; it encumbers our dock, and you must take it away immediately." If, after that, the shipowners had not taken it away, but had left it an unreasonable time, namely, 27 days, occupying the dock, neither the Court of Queen's Bench nor the Court of Exchequer Chamber has expressed an opinion as to whether there might not have been, by natural inference, an obligation on the part of the owners of the ship to pay a reasonable sum for the use of the dock for the time it was so impro-

perly left there. But the short question is only this, whether Messrs. *Somes* retaining the ship, not for the benefit of the owners of the ship, but for their own benefit, in order the better to enforce the payment of their demand, could then say, "We will add our demand for the use of the dock during that time to our lien for the repairs." The two Courts held, and, as I think, correctly held, that they had no such right.

But then, my Lords, a point has been raised here, which, if raised in the Court below, does not appear in the report of the judgment, whether, supposing Messrs. *Somes* had no right to add to their lien this extra claim of 567*l.* for the use of their dock, the shipowners could, after paying that demand, seek to recover it back again, even though notice of their intention to do so had preceded and accompanied the payment; and whether, when there was an improper claim made, they ought not themselves to have found what was the right sum, and to have tendered that in order to make Messrs. *Somes* (as it was called in the argument at the bar) wrongdoers. In my opinion, Messrs. *Somes* must, for this purpose, be considered wrongdoers from the very moment when they said, We will not give up your ship till you pay something *ultra* that which you are bound to pay. It does not lie in their mouths to say, that it was wrong on the part of the shipowners to pay a sum demanded by themselves, but which they had no right to demand. It is impossible so to contend. This point does not seem to me to vary the case, and I shall therefore humbly move your Lordships, that the judgment of the Court below be affirmed.

LORD WENSLEYDALE.—My Lords, I am entirely of the same opinion. Two principal points have been made in this case. The first is, whether if a person, who has a lien upon any chattel, chooses to keep it for the purpose of enforcing his lien, he can make any claim against the proprietor of that chattel for so keeping it. No authority can be found affirming such a proposition, and I am clearly of opinion that no person has, by law, a right to add to his lien upon a chattel a charge for keeping it till the debt is paid, that is, in truth, a charge for keeping it for his own benefit, not for the benefit of the person whose chattel is in his possession. That was the opinion of all the Judges of the Courts below, and I think their opinion is perfectly right.

The second point which has been made, is, that from the circumstances of this case there is a contract to pay, not merely for the repairs of the ship, but a contract to pay for the hire of the dock for so long a time as the vessel should be there. Now, we are at liberty to draw such inferences as we think ought to be drawn from the facts, and I am clearly of opinion that no such inference can be drawn in this case.

The only foundation for it is, that after Messrs. *Somes* sent this estimate for the necessary repairs of the ship, amounting to 4,296*l.*, the company sent a request that they would give the particulars of what they would charge for each article. The company's agent writes to say, "Your calculations to repair the ship '*British Empire*,' and Mr. Preston's letter, dated 16th, have been duly laid before the directors, when the suggestion of Mr. Preston not to repair the ship by contract

was duly considered. They now request me to ascertain at what price you would furnish the materials we should require to complete the repairs, viz., pitch pine, yellow pine, American elm, per cubic feet, oakum and pitch per cwt., iron work," and so forth; and "graving dock charges, when you can take her in, depth of water next week." In answer to that inquiry a letter was written by Messrs. *Somes*, from which it is said there is to be implied a demand on the part of Messrs. *Somes*, and a consequent contract for the hire of the dock, independently of the charge for the repairing job for so long a time as the ship shall remain in the dock. Now, I think it is perfectly clear that that letter can imply no such contract; the answer to that inquiry states, in detail, the price of American red elm, and so on, and then it concludes thus: "The cost of using graving dock for the job will be from 120 to 150 guineas;" that is to say, we cannot calculate precisely the length of time that it will require to use the dock for making the repairs, and therefore we make a sort of calculation, and the gross sum it will probably cost will be from 120 to 150 guineas; there is no statement that the owners are to pay 21*l.* a day for the time that the vessel shall remain there; and it would be quite absurd that if a person employs another to repair a ship, he should be considered as undertaking to pay so much a day for whatever length of time may be consumed in making the repairs; there is nothing in any part of the correspondence that leads to that conclusion. I am, therefore, clearly of opinion that there is not made out here an agreement on the part of the company to pay Messrs. *Somes* the cost of the hire of the graving dock.

Then it was objected, that there was no particular time at which it can be said that Messrs. *Somes* were wrongdoers in refusing to deliver up the vessel. But what are the facts here? [His Lordship gave a summary of them.] The additional sum thus charged and paid under protest includes the sum of 567*l.*, to which Messrs. *Somes* had no right by common law, and no right by contract to demand. They became wrongdoers by that act. Therefore, I am clearly of opinion, that in this case they have made a demand, which they had no right to make, for keeping possession of the ship till their charge for the dock-hire was paid; they have, by these means, obtained money which they had no right to obtain, and consequently an action for money had and received will lie, and the shipowners are entitled to a verdict.

Lord CHELMSFORD entirely agreed.

Judgment of the Court of Exchequer Chamber affirmed with costs.

The Hon. F. FITZMAURICE, Appellant, v. Sir JOHN BAYLEY, Bart., Respondent. *June 28; July 6; Aug. 3, 1860.*(a)

One paper referring to another, in which the terms of an agreement are stated, will constitute a contract sufficiently executed according to the provisions of the Statute of Frauds; but where the first paper was in these words, "I agree to let the premises in G. L. containing three stables, &c., for the same rent and subject to the same conditions that I hold them myself;" it was held (Lord Campbell, Lord Chancellor, *diss.*) that this paper, even though ratified by the proposed lessee, as it did not state the duration of the term, did not contain enough to constitute a memorandum of an agreement sufficient to satisfy the statute.

In the Court of Queen's Bench, in an action on an agreement, the questions discussed were, one of fact, what the parties had said and written to each other, and one of law, what was the construction to be put on two letters of the Defendant, which were relied on as a ratification of what his agent had done. In the Exchequer Chamber (upon the proceeding by appeal under the Common Law Procedure Act), the judgment of the Court was given on the ground that even if the Defendant's letters amounted to a ratification, it was null, for that the paper ratified did not contain a memorandum of agreement sufficient to satisfy the Statute of Frauds:

Held, that it was competent to the Court of Exchequer Chamber to adopt that ground for its judgment.

THIS was an appeal under the Common Law Procedure Act against a judgment on the discharge of a rule for a nonsuit.

Declaration on an agreement to which the defendant pleaded the general issue and several special pleas. The former alone is material. The cause was tried before Lord Campbell at the Middlesex sittings after Hilary Term, 1856, when it appeared that the plaintiff, Mr. Fitzmaurice, was possessed of a lease from December, 1850, for nine years and three quarters, of certain premises called Hamilton Lodge, situate at Kensington Gore, in the county of Middlesex, and also, under a different landlord, of another lease for five years, of stables in Gore Lane, 300 yards distant from the former premises. Negotiations for a sale of the lease and furniture, &c., of Hamilton Lodge were entered into, which were chiefly carried on by letters; a Mr. Rearden, a house agent, acting in these negotiations as agent for the defendant. The parts of the letters material to be considered in this case were the following:—There was a letter from the plaintiff to Mr. Rearden, which bore no date, but was said to have been written on the 30th August, 1855, and which contained a statement of the proposed terms and a list of the things to be taken, the whole amounting to a sum of 800*l*. One sentence was in these words, "And for the furniture as it stands, on view, ornaments, &c., mentioned, not included, 490*l*." This letter was addressed to Mr. Rearden, and was given to him, but was intended for the defendant's perusal. The letter did not contain any mention of the stables in Gore Lane, but the plaintiff gave evidence that they formed part of the subject of conversation between himself and Mr. Rearden. The plaintiff also stated that Mr. Rearden brought him back this letter in the evening of the 30th August, and said that the terms it contained would not suit the defendant, and the plaintiff said he would send a final proposition in the morning. The plaintiff, accordingly, on the following morning, addressed a letter to Mr. Rearden in these terms:—"Hamilton Lodge, 31 August, 1855. As Sir John Bayley declines my proposition that he should take everything as it stands for 800*l*., sooner than let the thing fall through, I am content

that it should go by valuation. I am therefore prepared to accept Sir John Bayley's proposition for him to pay 100*l.* premium for the remainder of the lease of this house for five years, he paying the annual rent of 180*l.* by quarterly payments, and all rates, taxes, &c., from the 29th September, 1855. I farther agree to his proposal that the whole of the furniture and fixtures are to be sold by valuation; Mr. Snell to value for me; Mr. _____ to value for Sir John Bayley. I farther agree to let Sir John Bayley the premises in Gore Lane, containing three stalled stables, coach-house, servants' room, and loft, for the same rent and subject to the same condition^(a) that I hold them myself; and I acknowledge to have received the sum of 50*l.* from Sir John Bayley this day as part payment of the 100*l.* premium and as an earnest of his carrying out these propositions. The furniture, fixtures, and the remainder of the premium to be paid for on Sir John Bayley receiving his agreement signed by me."

This letter was, as the plaintiff alleged, read to Mr. Rearden, and handed to him, and he then handed to the plaintiff a check of the defendant for 50*l.*, and took from the plaintiff the following receipt:—

"London, August 31, 1855.

"Received of Sir John Bayley, per Mr. Rearden, by check, the sum of 50*l.* as a deposit and part payment of the sum of 100*l.* for the lease of Hamilton Lodge; the furniture and fixtures to be taken by Sir John Bayley at a valuation, in accordance with my letter of date 30th August."

On the 14th September Mr. Rearden communicated to the plaintiff that the defendant would not take the stables in Gore Lane. A dispute arose between them, as to whether the above letter had been read to Mr. Rearden, and some high words passed. The plaintiff thereupon wrote to the defendant the following letter:—

"Hamilton Lodge, September 14, 1855.

"Sir,—I regret to have to trouble you *personally* on a subject of consequence; but, after the insolence of Mr. Rearden's conduct this morning, and his prevarication, I might be prepared for anything, but I certainly was not prepared to find (if what he states be true) that my letter of the 31st August last, accepting your proposition to me, has never been forwarded to you up to this date.

"I enclose copies of the same. I shall feel obliged if you will inform me if this be the case, and, if so, all farther comment on Mr. Rearden's conduct is unnecessary, as I should think this is an unheard-of thing, even in all the looseness of agencies.

"I hope that, between two gentlemen, there can be no possible difference of opinion as to your carrying out the proposition made, under your sanction, by your own agent.

"You will see, by your proposition of the 30th August, that it required an *immediate* answer; I therefore gave my acceptance to Mr. Rearden, personally, at his own office, on the 31st August; *I read it over to him myself*, and thereupon received a check from you in earnest of the whole thing being carried out. On taking my receipt, Mr. Rearden offered me a written acceptance of the agreement. I told him your check was sufficiently binding. The stables were inserted at Mr. Rearden's *express desire*, as he said you had six or seven carriages, and

(a) There was much discussion whether this word was condition or conditions.

would certainly want them. I have refused another party who required them, and there are no others to be had this side of Kensington turnpike, which I considered to be an object to you.

"This morning Mr. Rearden brought a letter from your solicitors wishing for an assignment of the leases. I will inquire of my solicitors if there is anything to prevent your having an assignment of the lease of this house, but as it was proposed taking the stable for five years only, I cannot give you an assignment of my lease for seven."

Enclosed in this letter were copies of Mr. Rearden's letter to plaintiff of the 30th August; and the plaintiff's letter to him, dated 31st August.

The defendant, on the 15th September, wrote a letter to the plaintiff, in which he said:—

"I have not heard one word from him [the agent], or any one else, about Hamilton Lodge, since this day fortnight, when I left London, and yours received this morning is the first and only letter I have had on the subject; I am therefore entirely ignorant of all that has occurred since; but of this you may be assured, that I shall not uphold Mr. Rearden in showing the slightest disrespect or incivility to you, and shall be very sorry if anything of the kind has occurred.

"In answer to your inquiry, whether your letter of the 31st of August, accepting my proposition, has ever been forwarded to me, I beg to state that on the evening of that day, being the night before I left town, he called and told me the business was arranged, and showed me a letter of that date, which I took to be your writing, which is in substance very much like the copy you have sent; but, speaking from memory, I do not think it is quite like. In the one I saw, I think there was some exception as to what was to be sold by valuation. One word was '*ornaments*,' but it was followed by another word which none of us could read, and I have no recollection that there was anything in it about the stables in Gore Lane. Indeed, until I received your letter this morning, I had no idea that there were any other stables but the two-stall stable adjoining the garden of the house, and so fully impressed was I with this idea, that since I have been at Cowes I have been endeavouring to make an arrangement for keeping some of my horses in the country, so that I might be able to do with two only in London, changing horses occasionally.

"Whether I read the letter, or Mr. Rearden read it to me, I cannot remember, though I rather think I read it myself, because I recollect being puzzled at the word I have before alluded to; however, whichever it was, I returned it to Mr. Rearden, and told him to keep it, and I suppose he has it; and whatever it is, it will speak for itself, and I am fully prepared to carry it out. I beg you will not think another moment about the pianos, but do exactly as you like, for I don't want either of them; and, if I had my choice, I should rather take one than two, as I have a very good one of my own."

On the 17th of September the plaintiff wrote to the defendant saying, among other things:—

"I think the agreement you refer to was that in which I offered to leave everything as it stood for 800*l.*, excepting the ornaments, pic-

tures,(a) various musical instruments which I had in the house, such as guitars, violoncello, small organ, and *piano-forte in the drawing-room*, which was a gift to my wife.

"You ought to have received the last agreement on the Friday morning before you left town, as I received your check *after* I had read the agreement over to Mr. Rearden, and placed it in his hands. It was thus drawn out because Mr. Rearden told me *you would require the stables*, and I felt confident you could not be comfortable here without them, as I originally stated to Mr. Rearden, because there is no room for a servant over the stables, and the coach-house is inconveniently small, as you may have seen, independent of being obliged to *put to* in the public road.

"I am satisfied that you will not have been here a week before you will find that you could not do without them, so I will say no more on the subject."

The defendant, on the 18th of September, wrote a letter to the plaintiff, containing the following passages:—

"With reference to the agreement, under which I was to take Hamilton Lodge, I could not say, from memory, when I wrote to you before, nor can I now, whether it was the one of the 31st August, of which you sent me a copy, or whether it is some other; though, for the reasons which I have stated to you, I thought, and still think, I did not agree to take it on the terms stated in your letter of the 31st of August; and, farther, that I never saw that letter until last Saturday, when you sent me the copy. I am the more confirmed in my belief, that my agreement was not that contained in your letter of the 31st of August, from a letter which I received from my lawyer last evening, in which he informed me that there was some difference between Mr. Rearden and yourself about the stables in Gore Lane, and inquiring of me how he should act, and in his letter he sent me a copy of your receipt, which is as follows." [It was here set out.]

"You will not fail to observe that the dates of these letters do not correspond, one being the 30th and the other the 31st of August, and the terms expressed in this receipt are exactly those which Mr. Rearden mentioned to me, and he mentioned no others. The agreement, however, whatever it is, or whatever its date, Mr. Rearden has, and, as I observed in my former letter, it will speak for itself, and whatever it is I shall carry it out.

"With respect to the authority which I gave Mr. Rearden, after his telling me that he had got me Hamilton Lodge on the terms of paying 100*l.* and taking fixtures and furniture at a valuation, I left everything *else* to him, desiring him to do the best for me he could, and to consult your convenience as far as possible, but that it would suit me best to have possession at Michaelmas. What he has done for me I do not know, as I have not heard from him or written to him since I left town; but, of course, I must support him in all he has done for me, except his showing any incivility or disrespect towards you. Having thus left everything to Mr. Rearden as my agent, and being in ignorance of everything he has done, except what I learn from your letters and my lawyers, I do not think I should act rightly if I were to interfere with any arrangement which he has made, or with

(a) The phrase proved to be "ornaments, &c., mentioned."

any differences which, unfortunately, exist between you, until I hear his side of the question. Until I got my lawyer's letter last evening, I could not understand what the difference was about the Gore Lane stables; but now I see the question is, whether they are included in my agreement or not; and, in answering your first letter, I did not think I was encroaching on Mr. Rearden's authority in saying that the agreement which he held would decide the question. The difference about the piano-fortes I did understand; and, considering *that* the main point of dispute between you, and wanting neither of yours, but at the same time preferring to take one than two, which was all you asked, I ventured, on my own authority, so far to interfere with Mr. Rearden, without consulting him, as to settle that question without reference to him. But, in my present state of ignorance, I do not think it fair towards Mr. Rearden to go farther than this, without communicating and consulting with him, and hearing what he has to say.

"I trust that you will see the propriety of my continuing to act through him, whilst I am responsible for what ~~he~~ he does, and until I hear from him what he has to say in defence of the conduct which he has pursued."

"With respect to my taking the stables in Gore Lane, that seems to me to depend upon two questions:—First, whether they are within the agreement under which I am to take Hamilton Lodge, and, if they are, I must of course take them, whether I like them or not, though I must say that, if I had known anything about them, I should certainly have gone to see them before I agreed to take them, and most assuredly should have inquired about the rent, which I never learnt until I received my lawyer's letter last evening, in which he mentioned that the rent was 40*l.* a year. Secondly, if they are not, I must claim the privilege of seeing them, and deciding for myself, before I give an answer. If they are good stables, and such rooms over them as I should expect a good servant to be satisfied with, and I would not put a servant into a room I would not occupy myself, I have no doubt I shall be but too glad to take them; but if I found they did not answer these purposes, and were obliged to take them, I should let them, and get others elsewhere.

"If it is found that my agreement does not comprise these stables, you will perhaps be kind enough to keep your offer of them open to me until the 29th, when I shall have an opportunity of seeing them, or my coachman will, and reporting to me, and then I will give you an answer at once."

There was then an explanation relative to going into possession on the 29th September:—

"I forgot to mention that I wrote to my lawyer last night, in answer to his letter received a few hours before, to say that I was not aware that the Gore Lane stables were included in my agreement, but that Mr. Rearden had it, and that, if they were included in it, to proceed to carry it out as regards the stables, and at all events as to Hamilton Lodge, and I have no doubt he will do so forthwith."

The plaintiff, on the 19th September, wrote to the defendant:—

"The difference in the dates between the receipt and the agreement is simply this, that *your proposition to me* came through your agent on

the NIGHT of the 30th Augt.; and he, requiring an *immediate* answer, I wrote my answer (enclosed to you) on the night of August 30. I gave it to Mr. Rearden on the morning of the 31st, having *read* it over to him *previous* to signing the receipt, which was drawn out by Mr. Rearden, and not by me."

"I think it right to mention, that there were but two agreements, one to take everything for a sum of money, which you rejected, and then made a counter proposition to me to take things at valuation.

"The stables were inserted in the latter at Mr. Rearden's *request*, who said you had so many carriages and horses *that you must have them*.

"It was of course impossible for me to do otherwise than give them up to you, as I conceived Mr. Rearden was speaking the truth."

At the close of the plaintiff's case, it was contended on the part of the defendant, that the general issue was not proved, inasmuch as no evidence had been given of the contract stated in the declaration sufficient to satisfy the provisions of the fourth section of the statute of frauds. The Lord Chief Justice, however, would not stop the case, and the defendant then gave evidence to contradict the representations of what had occurred in the conversations between the plaintiff and Rearden. The defendant stated that he went over the premises on the 29th with Rearden, that stables in Gore Lane were mentioned to him by Rearden, and that he said he did not require them, that they were not mentioned again to him, and that he never heard of them till he received the plaintiff's letter of the 14th September. Rearden stated that he told the plaintiff, on the 30th August, that the defendant did not want the stables in Gore Lane: and that the letter of the 31st August was brought to his office and left with the words "This is what we have agreed to," and that he (Rearden) received the letter but never opened it or showed it to the defendant, or knew its contents till the 14th September following.

The Lord Chief Justice ruled, upon the evidence on both sides, that Mr. Rearden had no prior authority from the defendant to take the Gore Lane stables, and that the question for the jury would be, whether he did in fact enter into this contract, contained in the plaintiff's letter of the 31st of August, including the Gore Lane stables. His Lordship also ruled that there was a sufficient subsequent ratification, by the defendant, of the agreement of the 31st of August, and that there was a sufficient memorandum of this agreement within the statute of frauds; but this latter point he reserved.

The jury found that Rearden had in fact entered into the agreement which included the stables in Gore Lane.

Leave to move to enter a nonsuit was given, and a rule having been obtained for that purpose, it was afterwards discharged, "Mr. Justice Crompton not concurring."^(a)

The case was then carried into the Exchequer Chamber, where the judgment of the Queen's Bench was reversed.^(b)

The judges were summoned, and Lord Chief Baron Pollock, Mr. Justice Wightman, Mr. Justice Crompton, Mr. Baron Bramwell, Mr. Justice Byles, and Mr. Justice Hill attended.

(a) 6 E. & B. 868 (E. C. L. R. vol. 88).

(b) 8 E. & B. 664 (E. C. L. R. vol. 92).

Sir *H. Cairns* and Mr. *Badeley*, for the appellant.—There was a sufficient contract here signed by the agent. Two pieces of paper may be connected together to constitute one contract, *Hammersley v. De Biel*, 12 Clark & F. 45, *Ridgway v. Wharton*, 6 H. L. Cas. 238; there may even be a sufficient acknowledgment of an unsigned contract made by a writing intending to get rid of it, *Shippey v. Derri-son*, 5 Esp. 190, where Lord Ellenborough said, “anything under the hand of a party expressing that he had entered into the agreement will satisfy the statute, which was only intended to protect parties from having parol agreements imposed upon them.”

A suit for specific performance may be maintained, even though all the particulars, as, for instance, the date of the commencement of a lease, are not stated: *Pym v. Blackburn*, 3 Ves. 34. It was not necessary, therefore, as supposed in the judgment in the Exchequer Chamber, that the period for which the stables in Gore Lane were to be let, should be expressly stated. The question on the statute of frauds is, whether the terms are sufficiently stated in writing. They were so here. They were “the conditions on which I hold;” those conditions were contained in a lease, and the contract was for the assignment of the lease.

[The LORD CHANCELLOR.—If nothing is said as to the term for the stables, must it be understood to be the same as the term for the house?]

If not, and the declaration is defective in that respect, the Court will amend it. Where an executory contract is entered into for making a certain article without any agreement as to the price, the memorandum of the contract will not be insufficient on that account: *Hoadly v. M'Laine*, 10 Bing. 482 (E. C. L. R. vol. 25).

The objection that this memorandum is not sufficient under the statute of frauds, cannot now be taken. This is an appeal against a decision on the discharge of a rule for a nonsuit, under the Common Law Procedure Act of 1854; it is not a writ of error on a judgment on the whole case; this new point cannot be raised on such an appeal.

[Lord CHELMSFORD.—It is not quite a new point, but only a fresh argument. The Court of Appeal is entitled to hear that.](a)

Mr. *Bovill* and Mr. *Garth*, for the respondent.—The statement of a contract, to make it sufficient under the statute of frauds, ought to be clear, definite, and precise, so as to avoid any necessity for parol evidence to show what are the terms of the contract. Assuming for a moment (though that fact is denied) that the respondent had seen the letter of the 31st August, and that his letter of the 15th September was an adoption of it, still there is no sufficient contract within the statute, for there is no statement of the time or the terms for the proposed tenancy of the stables.

These matters were necessary to create a contract which could be enforced in equity: *Clinan v. Cooke*, 1 Sch. & Lef. 22. There could not, therefore, be any ratification of a contract as to the stables, for no contract as to them was stated, or existed. There was not anything here to satisfy the statute; for though two papers may be connected together to constitute one contract, still that can only be done

(a) See *Withy v. Mangles*, 10 Cl. & F. 215.

where, taken together, they do form a complete contract. If either is defective there is no contract, *Brodie v. St. Paul*, 1 Ves. J. 326.

The letters of the respondent, properly considered, do not bear the construction put on them by the other side; they do not ratify the appellant's letter of the 31st August, which, indeed, the respondent had never seen.

No amendment of the declaration can now be made, for that would be to introduce a new contract on the record.

Sir *H. Cairns*, in reply.—*Brodie v. St. Paul* is not in point here, for in that case there was contradictory evidence with respect to the nature of the covenants; and Lord Redesdale, in *Clinan v. Cooke*, showed his disinclination to follow that case. It was found by the jury here, that in fact the respondent had ratified the agreement as set forth in the letter of the 31st August. That letter sufficiently describes the terms of the holding; they are those under which the appellant held, and he held under a lease which was to be assigned. This is not, therefore, like *Clinan v. Cooke*, a case of creating a new tenancy, without specifying what is to be its duration.

The LORD CHANCELLOR proposed the following question for the consideration of the Judges:

"Upon the evidence adduced at the trial, and the facts found by the jury as stated in the appeal to the Exchequer Chamber, is the plaintiff entitled to judgment?"

Mr. Justice HILL.—My Lords, in answer to the question submitted to the Judges, I beg to state, that in my opinion the plaintiff is not entitled to recover.

The question raised upon the rule to set aside the verdict and enter a nonsuit was, whether there was a sufficient contract in writing, signed by the defendant, to satisfy the statute of frauds.

It was insisted, on the part of the plaintiff, that the defendant had by writing signed by him adopted and bound himself to perform the terms contained in the plaintiff's letter of 31st August, 1855; and that such letter, by reason of that adoption and signature, was a sufficient contract in writing to satisfy the statute.

I am of opinion that it was not sufficient to satisfy the requirements of the statute. It is altogether silent as to the term for which the stables in Gore Lane were to be let by the plaintiff to the defendant, and the expressions which it uses are quite as consistent with its being the intention of the parties, that the underletting should be for as long a time as the plaintiff was interested in the stables, as for the term for which he held Hamilton House.

It is clear that an agreement for a lease not specifying a definite term cannot be enforced, nor can it be connected by parol evidence with an advertisement in which the duration of the term is expressed: *Clinan v. Cooke*, 1 Sch. & Lefr. 22. Neither is it sufficient that there exists a probability that the plaintiff intended to let the stables in Gore Lane for the term commensurate with the remainder of the lease of Hamilton House. Such probability would not be enough to satisfy the statute of frauds. On this short ground I am of opinion that the plaintiff is not entitled to recover.

I also think it right to add, that upon a careful consideration of the whole of the evidence of the plaintiff and of the correspondence, I

am unable to discover any agreement binding the defendant to take the stables for a definite term.

Mr. Justice BYLES.—My Lords, I am of opinion that your Lordships' question must be answered in the negative.

I find no document relating to the stables signed by Rearden, the agent. And as the alleged contract is a contract which must be in writing, signed either by the defendant's agent or by the defendant himself, it appears to me that the question of ratification does not arise, but that the true question is this, has the defendant personally entered into any such written and signed contract?

Supposing that the receipt of the 31st August is to be considered part of the contract, it refers only to the plaintiff's letter of the 30th August, not to the plaintiff's letter of the 31st August, and I see no reason for agreeing with the plaintiff's counsel that that date in the receipt is a mistake. But I think it does appear, from the contents of the defendant's letter of the 15th September, that the date of the 31st August mentioned in that letter is a mistake.

The letters which must be relied on to bind the defendant are his letters of the 15th and 18th September.

Without wearying your Lordships with minute observations, I think that the letter of the 15th September amounts to no contract to take the stables; for that, when carefully examined and compared with evidence legitimate for this purpose, it will be seen that it really refers to no written document in which the stables are mentioned.

The same observation applies, I think, to the defendant's letter of the 18th September.

So far as that last letter may refer in general terms to any parol contract between the plaintiff and the defendant's agent, it can have no effect. For a written ratification by the principal of a parol contract made by his agent, cannot satisfy the statute of frauds, unless the ratifying document either itself expresses the terms of the contract or refers to some writing that does.

I farther think that even if the plaintiff's letter of the 31st August could be made part of a written contract, by which the defendant was bound, still the interest which the defendant was to take in the stables does not appear. Whether the defendant was to be assignee of the plaintiff's term in the stables, or whether he was to be sub-lessee, and if sub-lessee, whether from year to year or for what term, and whether that tenancy or term was to be determinable by the defendant on his quitting Hamilton Lodge, are all stipulations material to be settled before there could be a contract in respect of the stables.

I agree, therefore, with the Court of Exchequer, that either there never was any complete contract with respect to the stables, or, that if there was, the writing does not contain it.

Mr. Baron BRAMWELL.—My Lords, I am of opinion that your Lordships' question should be answered in favour of the defendant.

I have great difficulty in seeing that any agreement was come to as to the stables. I cannot find whether it was an agreement for an assignment of the lease of the stables, or for a sub-lease for a term equal to the remainder of the term in Hamilton Lodge, or whether it was that the defendant should hold them so long as he held Hamilton Lodge; that is to say, that if the lease of that was determined in any

way, or he gave up the personal occupation of it, he should be at liberty to give up the stables. I can find no final agreement on this; and as the agreement for the house and stables is entire, an unascertained term of that agreement seems fatal to its validity. But assuming that there was a definite agreement as to the stables, I think it must have been one of the three I have mentioned. But then there is no memorandum in writing of that agreement. For assuming the receipt of 31st August to be so incorporated with the defendant's letters, and to be so adopted by him as, together with those letters, to constitute a memorandum in writing signed by him within the statute of frauds, it is not a memorandum of such an agreement as any of those I have mentioned. The *agreement* must be in writing, or some memorandum of *it*. Here the writing does not represent the agreement. It does not show either an agreement for an assignment of the lease of the stables, or any sub-lease thereof for a term certain or contingent, equal to the defendant's intended holding of Hamilton Lodge. Suppose a meaning can be put on it (which I doubt), I cannot think it could be held to mean either of the three possible cases I have mentioned. So that, though it might be a good memorandum in writing if it represented the *de facto* agreement, yet, as it does not do so, it is not sufficient: *Acebal v. Levy*, 10 Bing. 376 (E. C. L. R. vol. 25).

Farther, though with considerable doubt, I think there is no memorandum in writing signed by the defendant within the meaning of the statute of frauds. The question is, whether his letters and the plaintiff's letters, and the receipt of August 31st, with no extrinsic evidence except to identify them, so refer to each other that on collocation they make an agreement by the defendant, or a memorandum of one. I think not. It seems to me that the defendant, in his letters, always means that he has seen a paper: what its date and contents are he knows not; but it will speak for itself, and is in Rearden's hands, and by it he will be bound. I think he never meant to say, that he would take the stables, unless it was mentioned in the paper he saw that he was to do so.

Farther, there is great difficulty in saying that without extrinsic evidence, exceeding mere identification, it can be shown that the plaintiff's letter of 31st August, and not that of 30th August, contained the terms between the parties, and was the document on which the 50*l.* were paid. For these various reasons, I think your Lordships' question should be answered in the negative.

Mr. Justice CROMPTON.—My Lords, it seems to me that this case should be considered in two points of view; first, as it was presented to the Court of Queen's Bench; and, secondly, as it was dealt with in the Court of Exchequer Chamber.

When the case was before the Court of Queen's Bench I doubted whether it sufficiently appeared that the letters signed by the defendant, and supposed by reference to mention and adopt a prior document, really referred to the document of the 31st August; or whether they did not refer to the letter handed to the defendant by Rearden, and stated to have been written on the 30th August; or whether it is not so uncertain to which they refer as to render it impossible for the plaintiff to make out that it referred to, and incorporated, the one necessary to support the action.

In the first of Sir John Bayley's two letters, on which the case depends, that of the 15th September, it is clear to my mind that the defendant was referring to the letter of the 30th August, which contained no reference to the stables. In this letter of the 15th the defendant, after mentioning his doubts as to the letter he had seen, and as to which it turned out that his impression was correct, says:—"Whether I read the letter, or Mr. Rearden read it to me, I cannot remember; though I rather think I read it myself, because," &c. 'However, whichever it was, I returned it to Mr. Rearden, and told him to keep it, and I suppose he has it, and what *it* is *it* will speak for itself, and I am fully prepared to carry *it* out.' That clearly was the letter shown to the defendant by Rearden, now clearly established not to be the letter of the 31st August, to which Rearden was proved to have verbally assented.

In answer to this the plaintiff writes the letter of the 17th September, in which it is stated that there were two documents; and the answer of the defendant on the 18th September is the letter chiefly relied on by the plaintiff.

In this letter Sir John Bayley again repeats his doubts, and states his impression; and the words which appear to me most to favour the plaintiff's view are these words:—"The agreement, whatever it is, or whatever its date, Mr. Rearden has; and, as I observed in my former letter, it will speak for itself, and whatever *it* is I shall carry *it* out."

In relying on this, as it seems to me, the most material sentence in the letter, the Judges in the Queen's Bench, in their judgment, have not adverted to the reference to the former letter, but give the passage without the words, "as I observed in my former letter;" which certainly give a very different meaning to the expression, which, when correctly examined, appears to refer distinctly to the document mentioned in the former letter of the 15th September, which was clearly not the letter relied on by the plaintiff.

I am disposed to think, on this part of the case, that it is at least so doubtful to which letter Sir John meant to refer as the one to be binding upon him, as to prevent such reference incorporating the letter of the 31st August into that signed by him on the 18th September.

But it may be doubtful whether there was a sufficient signature within the statute of frauds of an agreement assented to by both parties, even adopting the most favourable construction for the plaintiff of the defendant's letter. The plaintiff's construction is, that the defendant writes in his letter of the 18th September that he will agree to that one of the two documents which was agreed to by Rearden; that is, in effect, I will agree to the document of the 31st August if Rearden really agreed to take the house by that document. Is it clear that the signing such a document comes within the rule according to which one document may be incorporated with another so as to constitute a signing within the statute of frauds? That rule is, that by referring in a document signed by the party to another document, the person so signing in effect signs a document containing the terms of the one referred to, according to the maxim, *Verba relata inesse videntur*. But does this rule apply to the case where a party says

only, "I do not know which is the document, but I will agree to the one as to which a particular circumstance has happened?"

Can it be said that such a letter, when signed, adopts and contains by reference the terms of either of the letters referred to? Is it not left to the danger of parol evidence? It might, perhaps, be a new conditional promise to agree to that letter which should turn out to be the real agreement, but such new conditional promise was not the promise on which the plaintiff sought to recover, nor, indeed, was any such new agreement ever assented to by the plaintiff. It seems somewhat difficult to say that the defendant assented, by his signature, at the time of such signature, unconditionally and simpliciter, to the terms of any particular document, so as to incorporate it with the one he signed. If it were a mere matter of identity as to a particular paper, it would of course lie within the rule; but it may be doubtful whether it is within the rule to promise in writing to agree to that one of two documents in dispute as to which a particular circumstance shall turn out to have happened.

As to the question upon which the Court of Exchequer Chamber decided, I concur in that judgment. By the letter of the 31st August, the remainder of the lease of Hamilton Lodge is to be taken by the defendant, which imports that it is to be assigned; but when we come to the engagement for the stables, it is quite uncertain to my mind what the agreement means. It is, "to let the stables for the same rent, and subject to the same conditions, that I hold them myself." This seems to me to contemplate rather a letting, as contradistinguished from an assignment; but when I come to ask myself for what term, I am utterly unable to find out. I quite agree that we are entitled, in endeavouring to put a construction on these words, to look at the state of the properties and the terms on which they were held; and we find that Hamilton Lodge was held by the plaintiff for a term of about five years, whilst the lease for the stables had about seven to run. Can we say, as suggested, that the word "conditions" implies "for the same term," so as to make the letting one for the seven years? I cannot think that it is at all expressed that this is the meaning. It would be an assignment in effect, and not properly a letting. Again, is it to be a letting for a time commensurate to the term in Hamilton Lodge? I doubt very much whether that was intended. It seems quite consistent with the terms of the document that the taker might want the stables only whilst he, having many horses and carriages, personally occupied the lodge; and he might be very unwilling to hamper himself with the stables if he ceased himself to occupy the lodge, and underlet or assigned it. It seems quite as likely that the letting should be from year to year; but that might not suit the taker, as he might then have been liable to be turned out whilst he wanted the stables. The letting most likely to suit the taker might be one by which he might have been entitled to hold the stables as long as he continued to hold the lodge, but with a right to determine the tenancy by the usual notice on his part; but probably the landlord might have objected to this.

I do not think that from the expressions used, aided by the fact of the same instrument relating to the other property, and from our knowledge of the duration of the leases, we can collect any sufficiently

expressed or definite terms of agreement for letting for any certain period. The case is not like the case where the price is omitted in a contract for the purchase of goods. There, no price is necessary to make a good legal contract, as the law infers a reasonable price; but there can be no reasonable time to be implied for the duration of the letting in the present case.

In all probability the parties had never considered or finally determined what the letting should be, but had inserted the words in question, thinking it better that Sir John should have the stables on some terms; but the agreement does not, in my opinion, show what these were to be.

It is no answer to say that this one clause being uncertain, does not affect the rest. It is part of one entire agreement, the agreeing to the whole of which, on the one side, is the consideration for the other side agreeing to the whole; and if the statute is not complied with as to any part, the agreement altogether is not within it.

I agree, therefore, with the Court of Exchequer Chamber, in thinking that the defendant did not sign any memorandum in writing which sufficiently expressed the terms of the agreement within the statute of frauds; and I answer your Lordships' question, therefore, in the negative.

Mr. Justice WIGHTMAN.—My Lords, the question in this case is, whether there was any contract in writing between the parties binding upon the defendant as being made according to the provisions of the statute of frauds; it being agreed that if there is a binding contract, any objection on the ground of variance may be cured by amendment.

Whatever contract there was between the parties, it is to be collected from the letters that have been given in evidence upon the trial; and it appears to me that the same difficulties that are suggested in the present case would have arisen upon the evidence, independently of any question upon the statute of frauds. Can any definite contract between the parties be collected from the written evidence in the case? For if it can, the plaintiff ought to succeed. It has been settled by a long course of authorities, that if there be an agreement in writing between the parties it is not necessary that it should be in one paper; it may be collected from many, provided they are connected by internal evidence.

On the 14th of September the plaintiff writes to the defendant a letter, which is the first communication that takes place directly between them. In that letter he expresses his regret that his letter of the 31st August to Mr. Rearden, accepting his proposition, had never been forwarded to the defendant, and encloses a copy of the letter. The plaintiff goes on to say, in his letter of the 14th of September, that the stables were inserted at Mr. Rearden's express desire, and that the defendant's solicitors had that morning written a letter wishing for an assignment of the leases; but that though there was nothing to prevent an assignment of the lease of the house, the defendant could not give an assignment of his lease of the stables, as it was proposed to take them for five years only, and the plaintiff's lease was for seven. He adds that he is preparing to leave the house, and that

the premises would be given up to the defendant on the 29th of September.

To this letter of the plaintiff of the 14th September, the defendant returned an answer of the 15th, in which he says that Mr. Rearden did, on the 31st of August, show him a letter of that date, but that it was in some respects unlike the letter of which a copy was sent; and that he, the defendant, did not recollect that it contained anything about the stables in Gore Lane; and that until he received the plaintiff's letter (of the 14th September), he had no idea that there were other stables than those adjoining the garden of the house. He then says, that he cannot remember whether he read the letter, or Mr. Rearden read it to him, but that whatever it was it would speak for itself, and he was fully prepared to carry it out.

On the 17th of September the plaintiff writes again to the defendant, and says that the defendant ought to have received the last agreement (that of the 30th of August), on the Friday morning before he left town, as he (the plaintiff) received the check after he had read the agreement to Mr. Rearden and placed it in his hands, that it was so drawn out because Mr. Rearden told the plaintiff that the defendant would require the stables, and he, the plaintiff, was satisfied that the defendant would not have been there a week before he would find that he could not do without them, and that so he (the plaintiff) would say no more on the subject. He then says that the completion of the business depends greatly upon the defendant's solicitors, who have had the leases (meaning, no doubt, the leases of the house and of the stables in Gore Lane) sent to them.

On the 18th September the defendant writes to the plaintiff, stating again his doubts whether the letter which Rearden had shown him, was that of which the plaintiff sent him a copy, and whether it was dated the 30th or 31st of August; and he adds, "the agreement, however, whatever it is or whatever its date, Mr. Rearden has, and it will speak for itself, and whatever it is I shall carry it out." Farther on he says, "If the stables in Gore Lane are within the agreement under which I am to take Hamilton Lodge, I must of course take them, whether I like them or not." And at the end of the letter he says that he was not aware that the Gore Lane stables were included in his agreement, but that Mr. Rearden had it, and that if they were included in it, his lawyer was to proceed to carry it out as regards the stables, and at all events as to Hamilton Lodge.

Now what is the contract, if any, to be collected from this written evidence? That it was proposed that the defendant should take Hamilton Lodge for the remainder of the plaintiff's term of five years from the 29th of September, and that he should take the stables in Gore Lane for five years; that in the letter of the 31st of August the plaintiff agreed to the defendant having the remainder of the lease of Hamilton Lodge for five years from the 29th of September; and also to let to the defendant the stables in Gore Lane for the same rent and subject to the same condition that he held them himself; and that the defendant agreed that if the stables, &c., were included in the letter of the 31st of August, of which the plaintiff had sent him a copy, and which Mr. Rearden had, the agreement in that letter should be carried out. Now there is no doubt but that the stables in Gore

Lane were included in that letter, but the commencement of the term in the stables is not specified in the letter, nor its end, nor whether it was to be from year to year, or was an assignment of the remainder of the term of seven years; but, taking the whole of what is stated in writing, it seems to me that the defendant agreed that if the stables were included in the agreement, namely, the letter of the 31st of August, it should be carried into effect as to them. And as it appears in writing that the proposition for the stables was that they should be taken for five years, I think that, taking the whole together, the defendant, by his letter of the 18th of September, adopted and confirmed the agreement contained in the letter of the 31st of August, explained as to the interest the defendant was to have in the stables by the statement in the plaintiff's letter of the 14th of September, in which the plaintiff states that the proposal was to take them for five years (which the defendant did not object to); and the plaintiff in that letter farther says, that the premises (which would include the stables) would be given up to the defendant on the 29th of September. It would therefore seem, from the written evidence, that the defendant did in effect agree to take the stables in Gore Lane for a term commensurate with his interest in the house, and commencing at the same time, namely, the 29th of September.

It is said, in the judgment of the Court of Exchequer Chamber, with respect to the stables, "that if anything at all definite had been agreed on, it seems to have been an underlease for five years, but without any stipulation as to the period from which the five years were to begin." As there is no doubt but that the Court will look to the circumstances known to both parties at the time, I am disposed to think that it appears upon the written evidence, that the stables were to be let by the plaintiff to the defendant for five years, commencing on the 29th of September, so as to be coextensive with the term in the house; and that the defendant did, by his letter of the 18th of September, agree to that effect.

I do not attach any importance to the stables not being mentioned in the receipt, as that document only related to that which the deposit was paid for, and which had no connection with the stables.

Upon the whole, I am of opinion, though I must confess with some doubt, that the plaintiff is entitled to succeed, even though the pleadings would require amendment, and I therefore answer your Lordships' question in the affirmative.

Lord Chief Baron POLLOCK.—My Lords, several questions arise in this case; first, whether there was any contract between Mr. Rearden and Major Fitzmaurice, verbal or written; secondly, whether Sir John Bayley ratified any contract, and if so, what? Thirdly, whether the contract, taking it to have been ratified, and to be founded on the letter of the 31st August, is sufficiently clear and explicit to be the foundation of an action?

I am not at all satisfied that there was any contract between Major Fitzmaurice and Mr. Rearden capable of being ratified. It may be said that the verdict of the jury has put that matter beyond doubt. But the receipt is silent about the Gore Lane stables, and professes to be founded on the letter of the 30th August. Major Fitzmaurice, however (in his letter of the 14th September), states, that he received

the 50*l.* in earnest of "the whole thing" being carried out; leaving it on the written memorandums, which the verdict of the jury cannot alter, quite uncertain whether there was not some misunderstanding and no agreement; but however this point may be, it appears to me very clearly, that Sir John Bayley's letter of 15th September confirmed and ratified the agreement, provided it was founded on the letter of 30th August, which he had seen. There cannot be a doubt as to the letter he referred to; it is sufficiently identified by the word "ornaments." He says, "I returned *it* to Mr. Rearden, and told him to keep *it*, and I suppose he has *it*; and "whatever *it* is *it* will speak for *itself*, and I am fully prepared to carry *it* out." All this clearly refers to the letter of the 30th August, and to that only. Major Fitzmaurice's answer calls Sir John Bayley's attention to the two letters, one of 30th August, the other of 31st August; to which Sir John Bayley replies:—"As I observed in my former letter, *it* will speak for *itself*, and whatever *it* is I shall carry *it* out;" which I understand to be merely a reiteration and confirmation of the former letter. He says, "I do not know what I saw; it may have been the letter of 30th or 31st, or some other, but whatever *it* is I shall carry *it* out;" the "*it*" always "being the letter he saw," which was no doubt the letter of the 30th August, and not whatever letter a jury might find was shown to Mr. Rearden, for he expressly declines to interfere as to differences between them. But the agreement or proposition contained in the letter of 31st August itself appears to me to be too uncertain to be the ground of an action, and it is an uncertainty that cannot, in my judgment, be cured by any amendment.

On the whole, therefore, I think it doubtful whether there was any clear, distinct agreement even between Mr. Rearden and Major Fitzmaurice. I am satisfied that Sir John Bayley did not ratify any agreement except that which he had seen, and therefore not the letter of 31st August; and even if it is to be taken that he ratified that, it is, I think, too uncertain and vague to be regarded as a compliance with the statute, and I think the plaintiff is not entitled to judgment.

The LORD CHANCELLOR (Lord CAMPBELL).—My Lords, for the reasons assigned by my brother Wightman, in answer to the question submitted by your Lordships to the Judges in this case, I adhere to the judgment of the Court of Queen's Bench as delivered by my brother Erle, now Lord Chief Justice of the Common Pleas.

It would appear that this judgment would have been affirmed in the Court of Exchequer Chamber had not a new point been there raised, which was not mentioned in the Court of Queen's Bench, viz., that although the terms of the agreement stated in the plaintiff's letter respecting Hamilton Lodge and the stables in Gore Lane had been ratified by the defendant's letter, yet, in as far as the stables were concerned, there was not a sufficient memorandum of the agreement to satisfy the statute of frauds, as the plaintiff in his letter merely said, "I agree to let to Sir John Bayley the stables in Gore Lane for the same rent and subject to the same conditions that I hold them myself," without stating the duration of the term for which the stables were let. Regard being had to the whole of the letter and to the facts which were known to both parties, I think that the meaning of this proposal was sufficiently certain, and that the defendant was not at

liberty to make this objection after his letter in which (as the jury found), in reference to this very letter he had written, "the agreement, whatever it is, or whatever its date, Mr. Rearden has, and it will speak for itself, and whatever it is I shall carry it out. If the stables in Gore Lane are within the agreement under which I am to take Hamilton Lodge, I must of course take them, whether I like them or not."

However, as I understand that my noble and learned friends who heard this appeal argued at your Lordships' bar are of a contrary opinion, the judgment appealed against must be affirmed.

Lord CRANWORTH.—My Lords, I certainly have come in this case to the conclusion that Major Fitzmaurice, the plaintiff below, has not established his case upon the facts stated in the special case, and that consequently he is not entitled to judgment. And I have come to that conclusion upon the ground that the requisitions of the statute of frauds were certainly not complied with. It is found as a fact (and that of course we cannot controvert) that the letter of the 31st of August was read over to Rearden, the agent. But then neither Sir John Bayley nor Rearden ever signed any agreement coming within the statute of frauds accepting the terms of that letter. I state that, because I come to that conclusion without any hesitation as a matter of fact upon reading those letters. The defendant Bayley's letter of the 15th September, in which he binds himself to take a lease, referred to the prior letter of 30th August, not to the letter of 31st August, although in his statement he mistook the date, or rather adopted the date from the statement of Major Fitzmaurice. Now, the letter of 30th August did not refer at all to the stables. I am of opinion, therefore, that Sir John Bayley never signed any letter accepting any lease which contained the stables as part of that lease. If that was doubtful upon the facts in evidence (and undoubtedly I cannot say it is not doubtful, after the opinion which has been expressed upon that point, not only by the learned judges below, but also by my noble and learned friend on the woolsack); still I think that the plaintiff would not be entitled to the judgment of the Court, because I think that, even if he had accepted in writing the terms in the letter of 31st August, it would not have amounted to a binding contract for taking the stables for any defined term of years. It might be that he was to take them for a term of years concurrently with the time for which he held Hamilton Lodge; it might be that he was to take them for the whole term for which Major Fitzmaurice held them, which was longer by a year or two than the term for which Hamilton Lodge was held. It is essential, in order to bring the case within the provisions of the statute of frauds, that there should be an agreement specifying the extent of the term for which the lease is to continue. Even therefore supposing that the letter of the 15th September did refer to the letter of the 31st August, which included the stables as well as the house, still I think that the plaintiff would not be entitled to judgment, because there was no written agreement showing for what term those stables were to be taken.

On these short grounds, I am of opinion that the judgment ought to be for the defendant.

Lord CHELMSFORD.—My Lords, it being admitted that Mr. Rearden

had no previous authority from Sir John Bayley to take the stables in Gore Lane, two questions arise in this case—

1st. Whether any agreement was, in fact, entered into between Rearden and Major Fitzmaurice relating to the stables?

2d. If there was such an agreement, whether it was ratified by Sir John Bayley?

With respect to the first question, the Court of Exchequer Chamber came to the conclusion that there never was any complete agreement as to the duration of tenancy for which the defendant was to take the stables, or that if there was, the writing did not contain it. And certainly there is nothing to prove the allegation in the declaration, that the defendant agreed to accept an underlease of the stables for the term of five years wanting fifteen days. Nor do the words in the letter of the 31st August, 1855, "for the same rent and subject to the same conditions as I hold them myself," bind Sir John Bayley to take an assignment of the lease of the stables; nor were they intended so to do. For in Major Fitzmaurice's letter of the 14th September, he writes, "but as it was proposed taking the stables for five years only, I cannot give you an assignment of my lease for seven." But if Rearden had received from Sir John Bayley a previous authority as ample as the ratification was supposed by the Court of Queen's Bench to have been, I should have been disposed to think that by his adoption of the terms of the letter of the 31st August, Rearden might have bound Sir John Bayley to take the stables from year to year.

It therefore becomes necessary to consider in the next place, what is the nature of the supposed ratification by Sir John Bayley, of any agreement entered into by Rearden. Now ratification may take place in two ways, either by a specific ratification of the particular Act, or by a general ratification of everything which has been done by the agent on behalf of his principal. There does not appear to me to have been any express ratification of the terms of the agreement contained in the letter of the 31st August. There is indeed very great doubt whether Sir John Bayley ever knew of that letter until he received a copy of it enclosed in Major Fitzmaurice's letter of the 14th September. From Sir John Bayley's letters of the 15th and 18th September, it would seem as if he had originally seen only Major Fitzmaurice's letter of the 30th August. The receipt which was prepared by Rearden, and in which the reference was made to that letter (probably by mistake, as there was a provision for valuing the furniture and fixtures also in the letter of the 31st August), was not sent to Sir John Bayley until the 17th September, as appears by his letter of the following day. And therefore nothing turns on the date of the 30th August in that receipt. [His Lordship here went fully through the letters and observed,] I am satisfied that Sir John Bayley was in error when he stated that the letter shown to him by Rearden was of the date of the 31st August, and that the only letter which he saw must have been the one of the 30th August, because there is the word "ornaments" in this letter, which is nowhere to be found in the letter of 31st August; and this last letter is the only one which mentions the Gore Lane stables. In the face of these statements, confirmed as they are by the circumstances to which I have adverted, it is impossible to

say that Sir John Bayley ever, in fact, agreed to the terms contained in the letter of the 31st August.

The Court of Queen's Bench, however, was of opinion that a ratification of the contract made by Rearden was established by the general expressions used by Sir John Bayley in his letters. One passage upon which the Court relied for this conclusion is from Sir John Bayley's letter of the 18th September. "With respect to the authority, &c." [see the letter, ante.] But in citing this passage, the Court has omitted the important word else, and also a portion of the sentence, by which a different meaning is given to the whole. [His Lordship read the whole of the passage.]

The strongest part of this letter, undoubtedly, and which is also relied upon by the Court, is the following: "The agreement, however, whatever it is, or whatever its date, Mr. Rearden has; it will speak for itself, and whatever it is I shall carry it out." On the one hand it is said that the meaning of this passage is, "Whatever you prove to be the agreement I will be bound by it." On the other, "I am ready to be bound by any letter, whatever it was, that was shown to me." I think that the fair interpretation of the language is, "If Rearden has done that which binds him, I shall consider myself bound, in fact, although I gave him no authority." This brings us back to the question whether Rearden had entered into any agreement for the Gore Lane stables. I think it is extremely doubtful whether there was any complete agreement between Rearden and Major Fitzmaurice upon this subject. At all events, the utmost extent to which the letter of the 31st August can be carried, is to the creation of a tenancy from year to year. But such a tenancy was clearly not in the contemplation of Sir John Bayley. And therefore, even if it should be considered that his expressions (vague and uncertain as they are) amount to a ratification of whatever was binding upon Rearden, this conclusion would not support the declaration; and no amendment ought to be allowed to force upon him an agreement entirely different from that into which (if at all) he must have meant to enter.

For these reasons I think the judgment of the Exchequer Chamber ought to be affirmed.

Judgment of the Exchequer Chamber affirmed, and appeal dismissed.

Gillaspie

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The examination of defendant, a bankrupt, commenced on 6th November, and was adjourned to 3d December, 1860. On 29th November the bankruptcy Commissioner, at the instance of O., a creditor of defendant, who had proved his debt, issued a certificate, under The Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, s. 257, Schedule B. a., withdrawing protection from defendant. O. sued out of the Court of Exchequer a ca. sa. upon this certificate, under which the sheriff arrested defendant on 1st December. In January, 1861, defendant being still in custody under that ca. sa., the Commissioner granted plaintiff, also a creditor, a similar certificate, under which a ca. sa. sued out of this Court, was in the same month lodged with the sheriff, as a detainer against defendant.

Held, discharging a rule calling on plaintiff to show cause why defendant should not be discharged from custody as to this last ca. sa., that defendant was legally detained in custody under it. That, assuming that stat. 12 & 13 Vict. c. 106, s. 112, gives a bankrupt an absolute statutory protection from arrest till the day fixed for his final examination, so that the original arrest of defendant was illegal, the detainer lodged by plaintiff was nevertheless good, not having been lodged until after defendant's privilege from arrest had ceased. That the principle applicable to such cases is, that whenever an arrest by a detaining party would have been good, a detainer by him, being equivalent to an arrest, will be good also, unless it appears that

the first arrest was a wrongful act of the sheriff himself, or that there was some collusion between the detaining party and the creditor making the arrest, or between the detaining party and the sheriff. *Bateman v. Freston*, 578.

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Where therefore F., a debtor, intending to petition the Insolvent Debtors' Court, voluntarily gave Y., one of his creditors, a warrant of attorney on which Y. entered up judgment, and issued execution, and the sheriff seized and sold the goods; and F. afterwards presented his petition, and an assignee was appointed:

Held, that the assignee could not treat the transaction as void from the beginning and maintain trover against Y. on an alleged wrongful conversion at the time of the seizure.

The assignee brought trover, alleging in the 1st count, that the creditor Y. wrongfully deprived F. of the goods. Y. pleaded not guilty, and also the warrant of attorney and the execution under it. The assignee replied, that after the 1 & 2 Vict. c. 110, and within three months before F.'s imprisonment, F., being in insolvent circumstances, did, with the intent of petitioning the Court, &c., voluntarily, fraudulently, and contrary to the statute, charge his estate in favour of Y., a creditor, by means of a warrant of attorney, fraudulent and void within the statute, whereby Y. obtained execution, &c.:

Held, that on this pleading trover was not maintainable against Y. Qu. Whether under such circumstances as these there could be any form of action by which the assignee could obtain redress?

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Stat. 17 & 18 Vict. c. 36, s. 1, enacts that every bill of sale of personal chattels shall be filed "within twenty-one days after the making or giving of such bill of sale," "otherwise such bill of sale shall," "as against all sheriff's officers and other persons seizing any property or effects comprised in such bill of sale in the execution of any process of any Court of law or equity authorizing the seizure of the goods of the person by whom" "such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued, be null and void to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale, which at or after the time" "of executing such process," "and after the expiration of the said period of twenty-one days, shall be in the possession or apparent possession of the person making such bill of sale."

Held that, under this enactment, the assignee of goods assigned by a bill of sale has twenty-one days from the date of the bill of sale, within which he may either file the bill of sale or take the goods out of the apparent possession of the assignor. That, therefore, the title of such assignee to the goods is not defeated by their seizure, while in the apparent possession of the assignor but before the twenty-one days have expired, under a *fi. fa.* issued against the goods of the assignor by an execution creditor. *Marples v. Harlley*, 610.

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Stat. 17 & 18 Vict. c. 36, s. 1, requires a description of the residence and occupation of the person making a bill of sale of personal chattels to be filed with every such bill of sale; in order to the validity of the bill of sale as against creditors of that person.

G. & H., printers carrying on business in copartnership in New Street, Blackfriars, in the city of London, but not sleeping there, having made a bill of sale of the partnership goods, the description filed

with the bill stated that they were printers and copartners, residing at New Street, Blackfriars, in the county of Middlesex.

Held that the description was sufficient, and the bill of sale valid: for that no creditor of G. & H. could have been misled as to their identity with the persons described, had the description merely specified New Street, Blackfriars, as their place of residence; and that the erroneous addition, "in the county of Middlesex," instead of "in the city of London," was only false demonstration.

Held, further, that New Street, Blackfriars, was the residence of G. & H. within the meaning of the statute. *Hewer v. Cox*, 428.

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By another clause it was provided, that when the owner of any coal-mine, &c., lying under the canal or reservoirs, or within the distance thereinbefore limited, should be desirous of working the same, then such owner should give a written notice of his intention to the Company three calendar months before he should begin to work such mines lying as aforesaid; and upon the receipt of such notice it should be lawful for the Company to inspect such mines, in order to determine what coal or other minerals might be come at and be actually gotten; and if the Company should neglect to inspect such mines within thirty days after the receipt of such notice, it should

be lawful for the proprietors of such mines, and they were thereby authorized, to work such part of the said mines as lay under the canal or reservoirs, or within the distance aforesaid: and if upon inspection the Company should refuse to permit the owners of the said mines to work such part of the said mines lying as aforesaid, or any part thereof, as they might have come at and actually gotten, then the Company should, within three calendar months, pay to the owners the value thereof.

By another clause it was provided, that nothing in the Act contained should defeat, prejudice, or affect the right of any owner of lands or grounds in, upon, or through which the canal, &c., should be made, to the mines lying within or under the lands or grounds to be set out and made use of for such canal, &c.; but all such mines were thereby reserved to such owners respectively; and it was declared that it should be lawful for such owners, subject to the conditions therein contained, to work all such mines: Provided that in working such mines no injury were done to the said navigation.

The owner of a coal-mine gave the statutory notice to the Company of his intention to work it under and within twelve yards' distance of one of the Company's reservoirs. The Company did not thereupon either inspect the mine, or refuse to permit it to be worked, or pay the owner the value of it.

Held that the mine owner, after the expiration of the time limited by the Act for the Company to take those steps, was entitled, notwithstanding the proviso to the last-mentioned clause, to work the mine under the reservoir in the usual and ordinary mode; and that no action lay against him by the Company for damage caused to the reservoir by reason of such working. *Stourbridge Navigation Company v. Earl of Dudley*, 409.

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The charter of The Saddlers' Company empowered the Wardens, or Keepers, and Assistants of the Company to elect Assistants from the Livery; such Assistants to take specified oaths before admission to the exercise of their office. It made the Assistants removable from office by the

electing body, for ill government, ill conduct, or any other just and reasonable cause. It imposed certain general restrictions on the eligibility of the members of the Livery as Assistants, and declared that all elections contrary to its directions and restrictions should be void. It then gave power to the Wardens, &c., to make such by-laws as should seem to them salutary, honourable and necessary for the good government of the Company, its members and officers.

By the usage of the Company, persons elected Assistants were eligible to further offices in a routine ending with the office of Warden. The Assistants did not receive or take charge of the Company's funds: but the Renter Warden (whose office was the first in order to which an Assistant was eligible) did, being in fact the treasurer. The Wardens, &c., in 1799, duly made a by-law "That no person who has been a bankrupt or become otherwise insolvent, shall hereafter be admitted a member of the Court of Assistants of this Company, unless it be proved to the satisfaction of the Court that such person, after his bankruptcy or insolvency, has paid and satisfied his creditors the whole of their debts, or shall have established a fair and honourable character for seven years subsequent to such his bankruptcy or insolvency, to the satisfaction of the Court or the majority of them."

D., a member of the Livery, but in insolvent circumstances, was elected, in manner pursuant to the charter, an Assistant of the Company. Afterwards, before he knew of his election and before his admission to the office, he made a representation to the clerk of the Company, false to his own knowledge, that he was solvent. He was then sworn in and admitted, and acted in the office. Being afterwards adjudged bankrupt, and his false representation of his circumstances having been communicated by the clerk to the Wardens, &c., of the Company, the latter, at a meeting duly held, but of which they gave D., and of which he had, no notice, removed him from his office.

These facts having been found by special verdict, at the trial of issues raised on a mandamus commanding the Wardens, &c., of the Company to restore D. to the office: Held, that D. was entitled to a peremptory mandamus, both on the ground that the by-law of 1799 was bad, first, as imposing an unreasonable disqualification on eligibility to the office; and, secondly, as limiting the disqualification imposed to admission, instead of extending it to election, to the office; and also on the ground that, assuming D.'s misrepresentation to have amounted to a corporate offence, which would justify his amotion, he could not be removed without notice and without being

heard; nor could his title to the office be tried by a proceeding other than a quo warranto.

Judgment reversed in the Exchequer Chamber; where held that the by-law was good in substance; for that the disqualification of a bankrupt or insolvent for office in the Company was not unreasonable, having regard to the nature and constitution of the Company; and that the disqualification did not violate the charter by unduly restricting the class from which the Assistants were eligible. Held, further, that the by-law was good in form; for that, properly construed, it invalidated the election, no less than the admission, of a disqualified person. Held lastly, that granting that D., if in his office, could not have been removed unheard from it for a corporate offence, the facts that he was from the beginning disqualified by the by-law for the office, and that he procured his admittance to it by fraud, showed that he never was properly in, and had no right to be restored to it. *Regina v. Saddlers' Company*, 42.

CHARTER-PARTY.

- I. Rate of freight payable, where goods are transhipped in the course of voyage, and a second charter-party is made, stipulating for higher freight than the first, 282. SHIP AND SHIPPING, III.
- II. Extent of liability of agent for foreign charterer, entering, as such, into charter-party, 495. SHIP AND SHIPPING, IV.

CHURCH BUILDING AND PARISHES FORMATION ACTS.

(1 & 2 W. 4, c. 38; 6 & 7 VICT. c. 37; 19 & 20 VICT. c. 104.)

1 & 2 W. 4, c. 38, s. 16; 6 & 7 VICT. c. 37, ss. 15, 17; 19 & 20 VICT. c. 104, ss. 11, 14. Who to elect churchwardens in a district constituted under stat. 1 & 2 W. 4, c. 38, and in which the Bishop has under the Marriages Act, 6 & 7 W. 4, c. 85, s. 26, licensed the solemnization of marriages.

By stat. 1 & 2 W. 4, c. 38, s. 16, two churchwardens are to be appointed for every church or chapel built under the provisions of that Act; one by the incumbent, and the other by the renters of pews.

The Marriages Act, 6 & 7 W. 4, c. 85, by sect. 26, empowers the Bishop of a diocese, by license under his hand and seal, to authorize the solemnization of marriages in a district chapel, for persons residing within the district. By sect. 32 the Bishop may, with the consent of the Archbishop of the province, revoke this license.

Stat. 6 & 7 VICT. c. 37, s. 15, enacts that when any church or chapel shall be built in any district, and consecrated as the church or chapel of such district, the dis-

trict shall, from and after such consecration, be and be deemed to be a new parish for ecclesiastical purposes. And, by sect. 17, in every such case of a district so becoming a new parish, two churchwardens are to be chosen for it; one by the perpetual curate of the new parish and the other by the resident inhabitants having a similar qualification to that which would entitle inhabitants to vote at the election of churchwardens for the principal parish.

Stat. 19 & 20 VICT. c. 104, by sect. 11, empowers the Ecclesiastical Commissioners, upon the application of the incumbent of a district church or chapel, with the written consent of the Bishop of the diocese, to make an order under their seal, authorizing the publication of banns of matrimony and the solemnization therein of marriages, baptisms, churchings and burials; all the fees for the performance of which offices are to be payable and to be paid to the incumbent. And by sect. 14, wheresoever or as soon as banns of matrimony and the solemnization of marriages, churchings, and baptisms, are authorized to be published or performed in any consecrated district church or chapel, such district not being at the time of the passing of that Act (1856) a separate and distinct parish for ecclesiastical purposes, and the incumbent of which is, by such authority, entitled for his own benefit to the entire fees for the performance of such offices, without any reservations thereon, such district shall become and be a separate and distinct parish for ecclesiastical purposes, such as is contemplated by stat. 6 & 7 VICT. c. 37, s. 15; the church of the district shall be the church of such parish; and all the provisions of stat. 6 & 7 VICT. c. 37, relative to new parishes, upon their becoming such, and to the matters and things consequent thereon, shall extend and apply to the said parish and church as fully and effectually as if it had become a new parish under the provisions of that Act.

The church of C. was built, and had a district assigned to it, under stat. 1 & 2 W. 4, c. 38. In the year 1840 the Bishop of the diocese granted, under stat. 6 & 7 W. 4, c. 85, s. 26, his license for the publication of banns and the solemnization of marriages in the church, and for taking the same fees in respect thereof as were taken in the mother church by the minister and incumbent thereof for the time being; to which the fees for churchings, baptisms and burials were afterwards added. From the consecration of the church down to the issuing of the writ of mandamus in the present case, two churchwardens were chosen for the church in the manner directed by stat. 1 & 2 W. 4, c. 38, s. 16; one by the incumbent, and the other by the pew renters.

Upon demurrer to the return to a manda-

mus to the incumbent of the district to convene a meeting of the inhabitants to elect a churchwarden, the return alleging that the incumbent and the pew renters had the privilege of electing the churchwardens, and that stats. 6 & 7 Vict. c. 37, s. 15, and 19 & 20 Vict. c. 104, s. 14, were inapplicable: Held that the return was good. That the authority contemplated by stat. 19 & 20 Vict. c. 104, s. 14, was not a revocable license by the Bishop, but an authority under an order of the Commissioners under sect. 11 of that Act; and that therefore the district was not brought within the operation of stat. 19 & 20 Vict. c. 104, s. 14.

Semble, that stat. 6 & 7 Vict. c. 37, s. 15, is inapplicable to the case of a district constituted, not under that Act, but under stat. 1 & 2 W. 4, c. 38, with a license by the Bishop under stat. 6 & 7 W. 4, c. 85. *Regina v. Perry*, 640.

CHURCHWARDENS.

Election of, in districts formed out of parishes, 640. CHURCH BUILDING AND PARISHES FORMATION ACTS.

COMMON LAW PROCEDURE ACT, 1854.

(17 & 18 Vict. c. 125.)

Sect. 58. Extent of jurisdiction of Court or Judge, in making order for inspection of real property.

The Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 58, enacts that "either party" to an action "shall be at liberty to apply to the Court or a Judge for a rule or order for the inspection by the jury, or by himself, or by his witnesses, of any real or personal property the inspection of which may be material to the proper determination of the question in dispute; and it shall be lawful for the Court, or a Judge, if they or he think fit, to make such rule or order, upon such terms as to costs and otherwise as such Court or Judge may direct."

Held, that this section gives, as ancillary to the power to order inspection, the same power to order the removal of obstructions, with a view to inspection, which is exercised by the Courts of equity as ancillary to their power of ordering inspection.

Plaintiff and defendants were adjacent mine owners. Plaintiff having reason to believe that defendants had encroached upon his mine, obtained permission from them to make an inspection of their mine, when he found a recently erected wall at the boundary between the two mines, which prevented him from ascertaining whether defendants had encroached upon his mine or not. Application by him to defendants for permission to take down a portion of this wall in order to complete

the inspection having been refused, plaintiff applied to a Judge at Chambers, under the above section, for an order for inspection. The Judge, upon being satisfied that a portion of defendants' wall could be safely removed, and an inspection behind it made without danger to life, and with no further detriment to defendants than a temporary suspension of their works, made an order that plaintiff should inspect defendants' mine at and behind the wall, and should be at liberty, so far as was necessary for the purpose of the inspection, to make a driftway through the wall; before making the inspection giving security to the satisfaction of the master to the extent of 500*l.*, or depositing that sum with the master, to abide any order the Court might make as to indemnifying defendants from any loss or damage they might sustain in consequence of the inspection.

Held, refusing a motion on behalf of defendants for a rule calling on plaintiff to show cause why this order should not be set aside, that the order was good, and not in excess of the Judge's jurisdiction under the statute. *Bennett v. Griffiths*, 467.

COMPANY.

I. Empowered by statute to take tolls in return for a public service, when not bound to exact uniform toll from all persons, 365. TOLL, II.

II. Railway.

1. Deductions allowable to, from rateable value of line to poor rate, 392. RATE, I. 1, iv.
2. Rateable value to poor rate of railway station used by two Companies, 450. RATE, I. 1, v.
3. Liability of, to action for false imprisonment. What sufficient evidence of authority by, to their officers, to arrest passenger for travelling without having paid his fare. Railways Clauses Act, 1845, 8 Vict. c. 20, ss. 103, 104.

A railway Company, though it be a corporation, is liable in an action for false imprisonment, if that imprisonment be committed by its authority. Such authority need not be under seal; but it lies upon the plaintiff to give evidence justifying the jury in finding that the persons actually imprisoning him, or some of them, had authority from the Company to do so.

The Railways Clauses Act, 1845, 8 Vict. c. 20, by sects. 103, 104, imposes a penalty on any person travelling on a railway without having paid his fare, with intent to avoid payment thereof; and empowers all officers and servants on behalf of the Company to apprehend such person until he can conveniently be taken before a justice.

Held that, inasmuch as the exigency of deciding whether or not a particular pas-

senger shall be arrested by a railway Company's servants under this statute must be naturally expected to arise frequently in the ordinary course of the Company's business, and is of such a nature that the decision must be made promptly on the Company's behalf, it is a reasonable inference that the Company have on the spot, at their stations, officers with authority to make the decision promptly for them.

In an action against a railway Company for the false imprisonment of plaintiff on an unfounded charge under the statute, the evidence for plaintiff showed that he, having travelled on defendants' line with a return ticket from L. to W. and back, at the end of the return journey gave up to defendants' ticket collector at the L. station the return half of another ticket which had then expired, and which he had put in his pocket by mistake for the right one. The ticket collector thereupon took him to the ticket office, where he explained the mistake. Thence the collector took him to defendants' paid inspector of police at the station, and the collector and inspector thence took him to the office, also at the station, of the superintendent of the line, who, refusing to accept plaintiff's explanation, said to the inspector, "I think you had better take him, but first you had better obtain the concurrence of the secretary." The inspector thereupon left, but returned shortly afterwards (whether or not having obtained the secretary's concurrence did not appear), when he directed a police constable, also in defendants' pay, to take plaintiff before a magistrate on the charge. The constable did so, and the magistrate, plaintiff's story proving true, dismissed the complaint. Held, that the conduct of all defendants' other officers, in referring to the superintendent of the line as the superior authority, was sufficient evidence to go to the jury that he was an officer having authority to act for defendants in arresting plaintiff. *Goff v. Great Northern Railway Company*, 672.

III. City. Construction of charter and by-laws of, 42. CHARTER.

CONTRACT.

- I. For partnership in freight. Liability of one partner to the other for demurrage, 303. SHIP AND SHIPPING, II.
- II. Admissibility of parol evidence to explain written, 306. EVIDENCE, I. 3.

CONVICTION.

For gaming. Liability of innkeeper to, 1. GAMING.

CORONER.

What inquests he may not hold.

1. Inquest on cause of a fire by which

no death is occasioned. Prohibition lies to a criminal Court.

A coroner has no ex officio jurisdiction, at common law, to hold any other inquest than one on a dead body, *super visum corporis*. He cannot, therefore, hold an inquest to inquire into the origin of a fire by which no death has been occasioned.

Prohibition lies to a Court of criminal, no less than to one of civil, jurisdiction. *Regina v. Herford*, 115.

2. Second inquest, *mero motu*, on a body on which inquest has been already held *super visum corporis*, and verdict recorded.

A coroner has no power, after holding an inquest *super visum corporis* and recording the verdict, to hold a second like inquest, *mero motu*, on the same body; the first not having been quashed, and no writ of *melius inquirendum* having been awarded. *Regina v. White*, 137.

CORRUPT PRACTICES AT ELECTIONS ACT.

(15 & 16 VICT. C. 57.)

EVIDENCE, I. 1, ii.

COSTS.

- I. Right of defendant to, where plaintiff is nonsuited. Stat. 4 Jac. 1, c. 3, s. 2. Nonsuit of mortgagee of turnpike tolls, in ejectment by him to recover the toll-gates. Stat. 3 G. 4, c. 126, ss. 48, 74. Effect, on defendants' right to costs, of defence by one of them as landlord, *quā* turnpike trustee.

Stat. 4 Jac. 1, c. 3, s. 2, enacts, that "In any action" "of trespass or ejectione firmæ, or any other action whatsoever, wherein the plaintiff" "might have costs (if in case judgment should be given for him)" if "the plaintiff" "after appearance of the defendant" "be nonsuited," "the defendant" "shall have judgment to recover his costs against every such plaintiff."

The General Turnpike Act, 3 G. 4, c. 126, by sect. 48 imposes a penalty upon a mortgagee of tolls who shall keep possession of the toll-gates and receive the tolls, after he has been satisfied the mortgage debt, with interest and costs. Sect. 74 directs that some one of the trustees of a turnpike road, or the clerk to such trustees, may be sued instead of the trustees; with a proviso that every such defendant shall be reimbursed, out of the turnpike funds, all such costs, charges and expenses as he shall be put to or become chargeable with or liable to, by reason of his being so made defendant.

Plaintiff, executor of a mortgagee of turnpike tolls, brought ejectment to recover the toll-gates; making the keepers of the toll-gates defendants to the writ. J.. a

trustee of the road, thereupon obtained leave to defend as landlord. Plaintiff was nonsuited, and defendants signed judgment for their costs, and took plaintiff in execution on a ca. sa.

Held, discharging a rule obtained by plaintiff to set aside the judgment and execution, that defendants were entitled to their costs. That, assuming that stat. 4 Jac. 1, c. 3, s. 2, makes it a condition to a defendant's right to costs, when the plaintiff is nonsuited, that the plaintiff, if successful, would, in the particular action, have been entitled to costs, the case was within the statute; sect. 48 of stat. 3 G. 4, c. 126, implying that plaintiff, if successful, would have recovered his costs, even if J. would, by sect. 74, have been exempted from personal liability to pay them; and, J.'s co-defendants not being, in any view of the case, exempt from such liability.

Quære, whether stat. 4 Jac. 1, c. 3, s. 2, does not give costs to defendants, where plaintiffs are nonsuited, in all actions in which, in general, successful plaintiffs would be entitled to costs.

Quære, also, whether, had plaintiff succeeded, J. would have been exempted, by stat. 3 G. 4, c. 126, s. 74, from personal liability to pay plaintiff's costs. *Cobbett v. Wheeler*, 358.

- II. Of Chancery suit by third person against plaintiff by defendant; recoverable in action for such fraud, 537. **TRADE MARK.**

COUNTY.

Sea shore, how far part of, 234. **JURISDICTION**, II. 2.

COUNTY RATE.

Obligation of all persons to give evidence before committee of justices appointed to prepare basis for. Stat. 15 & 16 Vict. c. 81, ss. 2, 7, 8; 501. **STATUTE, CONSTRUCTION OF.**

COURT MARTIAL.

Place of custody of offender sentenced by, in India, how changed, 338. **HABEAS CORPUS**, II.

DAMAGES.

In action for fraudulently procuring plaintiff unknowingly to counterfeit a third person's trade mark, 537. **TRADE MARK.**

DEMURRAGE.

Liability to, of shipper of goods, to person with whom he has contracted for partnership in freight, 203. **SHIP AND SHIPFIRE**, II.

DETAINER.

Of debtor originally arrested under invalid ca. sa., 578. **BANKRUPT AND INSOLVENT**, II.

DISTRESS.

- I. For rent. **LANDLORD AND TENANT**, 2.
II. For rate. **RATE**, I. 2.

DOCUMENTS.

- I. Inspection of, 609. **PRACTICE**, II.
II. Documentary evidence. **EVIDENCE**, I. 1.

EJECTMENT.

Costs where plaintiff is nonsuited in, 352. **COSTS**, I.

ELECTION.

- I. Of Member of Parliament. Evidence at inquiry into corrupt practices at, 652. **EVIDENCE**, I. 1, ii.
II. Of aldermen in boroughs. Sufficiency of voting papers, 634. **MUNICIPAL CORPORATIONS REFORM ACTS**, II.
III. Of churchwardens, in districts formed out of parishes, 640. **CHURCH BUILDING AND PARISHES FORMATION ACTS.**
IV. To corporate office, how far invalidated by misrepresentation by candidate elected, 42. **CHARTER.**

ENCLOSURE ACTS

(Stat. 8 & 9 VICT. c. 118; 15 & 16 VICT. c. 79.)

Valuer acting in an enclosure when not entitled to apply to justices for recovery of possession of encroachment. Jurisdiction of justices. What is an ancient enclosure.

Stat. 15 & 16 Vict. c. 79, s. 13, empowers the valuer acting in the matter of an enclosure to apply to justices to recover possession of any encroachment or enclosure which, under stat. 8 & 9 Vict. c. 118, "shall be deemed to be parcel of the land subject to be enclosed," possession of which the actual occupier neglects or refuses to deliver up, after the determination of claims under that Act.

Held that, on the hearing of such an application by the valuer, the justices have jurisdiction to inquire into the circumstances attending the encroachment or enclosure in question: notwithstanding that the occupier has made no claim before the valuer or the Enclosure Commissioners, and has not appealed against the award of the Commissioners, which includes the land in dispute. That, therefore, the justices were right in refusing to order possession to be given to the valuer of a piece of land proved to have been first enclosed more than twenty years

before the first meeting of the commissioners for the examination of claims; such land being, under stat. 8 & 9 Vict. c. 118, s. 52, an ancient enclosure, and that section, taken with section 50, showing that enclosures, only, of less than such twenty years' standing are, under that Act, to be deemed to be parcel of the land subject to be enclosed. *Chilcote v. Youlden*, 7.

ENCROACHMENT.

Proceedings before justices to recover possession of, under Enclosure Acts, 7. ENCLOSURE ACTS.

EVIDENCE.

I. Admissibility of.

1. Documentary.

i. Of registration of British ship under Merchant Shipping Act, 1854, 178. MERCHANT SHIPPING ACT, 1854.

ii. Document referred to by witness when under examination by Commissioners appointed under Corrupt Practices at Elections Act, 15 & 16 Vict. c. 57, as then existing. Its admissibility against him in subsequent proceedings. Secondary evidence of document privileged from production. (*Per Hill, J.*)

The Corrupt Practices at Elections Act, 15 & 16 Vict. c. 57, s. 8, requires all persons summoned to give evidence before Commissioners appointed to inquire into such practices to attend the Commissioners and answer all questions put by them, and produce all books and documents bearing on the inquiry. "Provided always, that no statement made by any person in answer to any question put by such Commissioner shall, except in cases of indictment for perjury committed in such answers, be admissible in evidence in any proceeding, civil or criminal."

Held that, notwithstanding this proviso, a document already in existence before the time at which a witness is examined before the Commissioners, and referred to by him in the course of that examination, is admissible in evidence against him in subsequent proceedings, other than the specified indictment for perjury, if it be otherwise admissible, and be proved by independent evidence aliunde.

Per Hill, J.—Assuming that such a document, if communicated by the witness to the Commissioners under compulsion, is privileged from production in the subsequent proceedings, independent secondary evidence of its contents is then admissible. *Regina v. Leatham*, 658.

2. Secondary.

Of document privileged from production (*per Hill, J.*), 658. EVIDENCE, I. 1, ii.

3. Oral.

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Of usage of trade or business, to explain term of art in written contract.

Plaintiff, a builder, by deed contracted with defendants to build for them a house and premises for a certain sum. The deed provided that "no alterations or additions shall be admitted unless directed by the architect of" defendants "in writing under his hand, and a weekly account of the work done thereunder shall be delivered to the said architect or the clerk of the works on every Monday next ensuing the performance of such work; and the delivery of such account shall be a condition precedent to the right of" plaintiff "to recover payment for any such addition or alteration."

In an action by plaintiff to recover the balance due under the contract, the claim including charges for additions and alterations: Held, first, that parol evidence was admissible for plaintiff to explain that the expression "weekly account" was a term of art well known in the building trade, and meant, by the usage of the trade, an account of the day work expended in each week on the additions and alterations, and the materials used in such day work. Secondly, that mere sketches of the manner in which the extra work was to be done, prepared and furnished to plaintiff by defendants' architect, but not signed by him, were not directions in writing under the hand of the architect, within the meaning of the contract. *Myers v. Sarl*, 306.

II. Obligation of all persons to give evidence before committee of justices appointed to prepare basis for county rate; stat. 15 & 16 Vict. c. 81, ss. 2, 7, 8; 501. STATUTE, CONSTRUCTION OF.

III. What sufficient evidence of authority from railway company to servant, to arrest passenger for travelling without having paid fare, 672. COMPANY, II. 3.

FALSA DEMONSTRATIO.

BILLS OF SALE REGISTRATION ACT, 2.

FIRE.

Coroner, when has not jurisdiction to hold inquest respecting cause of, 115. CORONER, 1.

FOREIGN JUDGMENT.

In rem. Its conclusiveness, till reversed, 708. ACTION, V.

FRAUD.

TRADE MARK.

FREIGHT.

SHIP AND SHIPPING, II. III.

FRIENDLY SOCIETIES ACTS.

(10 G. 4, c. 56; 18 & 19 Vict. c. 63.)

What disputes between a society and its members may be sued upon, and what must be settled by justices or by arbitration. 10 G. 4, c. 56, s. 27; 18 & 19 Vict. c. 63, ss. 1, 40.

The Friendly Societies Act, 10 G. 4, c. 56, enacts by sect. 27, "that provision shall be made by one or more of the rules of every such society," "specifying whether a reference of every matter in dispute between any such society, or any person acting under them, and any individual member thereof, or person claiming on account of any member, shall be made to" "justices of the peace" "or to arbitrators." The subsequent Act, 18 & 19 Vict. c. 63, which by sect. 1, repeals the former, "save and except as to any offences committed, or penalties or liabilities incurred, or bond or security given, or proceedings taken under the same, before the commencement of" the repealing Act, by sect. 40 enacts, that "every dispute between any member or members of any society established under this Act or any of the Acts hereby repealed, or any person claiming through or under a member, or under the rules of such society, and the trustee, treasurer, or other officer, or the committee thereof, shall be decided in manner directed by the rules of such society, and the decision so made shall be binding and conclusive on all parties, without appeal."

The rules of a friendly society formed under stat. 10 G. 4, c. 56, provided that if any dispute should arise as to the legality or payment of any fine, money, or allowance, or as to the disqualification of any member at the time of his admission, or between any officer and member, it should be referred to the decision of the committee of the society, from whom there should be an appeal to justices.

Before July, 1855, when stat. 18 & 19 Vict. c. 63, came into operation, defendant, the treasurer of this society, received, as such, certain moneys, the balance of which he failed to pay over to plaintiffs, the society's trustees, and to recover which plaintiffs after that date brought this action.

Held that, whether the case was governed by stat. 10 G. 4, c. 56, or by stat. 18 & 19 Vict. c. 63, the action lay: for that the plaintiffs' claim was not a dispute between the society and the defendant in his capacity as an individual member of it, which disputes alone were required by either statute to be dealt with under the society's rules, and otherwise than by action.

Held, by Hill, J., that stat. 18 & 19 Vict. c. 63, governed the case. *Sinden v. Banks*, 623.

GAME ACT.

(1 & 2 W. 4, c. 32.)

Sect. 4. Penalty is incurred by licensed dealer in game, who sells live birds of game at prohibited time.

Stat. 1 & 2 W. 4, c. 32, s. 4, imposes a penalty upon any licensed dealer in game who buys, sells, or knowingly has in his possession or control, any bird of game after the expiration of ten days from the respective days in each year on which it shall become unlawful to kill or take such birds of game respectively; and upon any person not licensed to deal in game, who buys or sells any bird of game after the expiration of the same period, or who knowingly has in his possession or control any bird of game (except birds of game kept in a mew or breeding place) after the expiration of forty days from the respective days on which the season for lawfully killing such birds ends.

Held, that throughout this section the words "birds of game" include live birds; and that a licensed dealer in game incurs the penalty by selling such birds after the expiration of the ten days specified by the statute. *Loome v. Bailly*, 444.

GAMING.

Stat. 9 G. 4, c. 61, s. 21, and Sched. C. What amounts to gaming by an innkeeper.

Stat. 9 G. 4, c. 61, s. 21, imposes penalties upon an innkeeper for offences against the tenor of his license. The form of license is given in Schedule C. of the Act, and contains a proviso that the innkeeper shall "not knowingly suffer any unlawful games or any gaming whatsoever" in the licensed house and premises.

Held, that an innkeeper was liable to conviction, under sect. 21, for playing cards for money with private friends of his own in his own private room in the inn. *Patten v. Rhymer*, 1.

HABEAS CORPUS.

I. Father of female child under age of sixteen is entitled to her custody, apart from her consent.

As a general rule, the father of a female child under the age of sixteen is legally entitled to her custody; and she is not of an age to exercise a discretion to withdraw herself therefrom. Persons detaining such a child from her father's protection, though with her consent, will therefore be ordered by this Court, on proceedings by habeas corpus, to give her up to her father. *Regina v. Howes*, 332.

II. Offender convicted in India by Court-martial, and removed thence to English prison to undergo sentence, when cannot be detained in England. *Mutiny Act*,

1857, ss. 1, 38, 40, 41. Articles of War. Proper prison for such offender. Change of his place of custody how far lawful, and how may be made.

By the 131st of the Articles of War drawn up in pursuance of The Mutiny Act for 1857, 20 Vict. c. 13, s. 1, jurisdiction was conferred on general Courts-martial in India to try and sentence certain military offenders accused there of civil offences. By sect. 38 of that Act, the place of imprisonment under the sentences of general Courts-martial is to be appointed by the officer commanding the district. By sect. 40, every governor or keeper of any public prison in any part of Her Majesty's dominions is required to receive into and keep in his custody any military offender under sentence of imprisonment by a Court-martial, upon delivery to him of an order in writing in that behalf from the officer commanding the regiment to which the offender belongs, containing certain specified particulars. By sect. 41, in the case of a prisoner undergoing imprisonment under the sentence of a Court-martial in any public prison other than the military prisons set apart by the authority of the Act, the officer commanding the district is empowered to give an order in writing, directing that the prisoner be delivered over to military custody, for the purpose of being removed to some other prison or place, there to undergo the remainder of his sentence.

A., a military offender amenable to the jurisdiction, was tried in India, under the above statute, by a general Court-martial, for a civil offence, of which the Court found him guilty, and for which they sentenced him to four years' imprisonment. The officer commanding the district in which he was tried appointed the Fort of Agra as the place of his imprisonment. It did not appear whether this fort was or was not a public prison, or was or was not a military prison set apart by the authority of the Act. It was, however, under military command. A. was imprisoned there for about nine months; at the end of which the same officer who had appointed it as the place of imprisonment gave an order in writing, directing that he should be removed therefrom to England, to undergo there the remainder of his sentence; but not mentioning any prison in England to which he was to be removed. A., having been brought to England under this order, was there confined in several prisons in succession, and, ultimately, in the Queen's Prison; an order from the Commander-in-Chief of the army in England, directing the keeper of that prison to receive him into custody for the remainder of his sentence, being sent there with him.

Held, making absolute a rule for a habeas corpus obtained by A., that A. was entitled to his discharge: for that his de-

tention in custody, which could not be justified at common law, was not warranted by the Act in question; inasmuch as, assuming (a point which the Court did not determine) that the case fell within the provisions of the Act as to the removal of prisoners, no valid order for his detention in the Queen's Prison had been made under either sect. 40 or sect. 41. *Re Allen*, 338.

III. Jurisdiction of superior Courts of common law at Westminster to issue habeas corpus ad subjiciendum to all parts of the Crown dominions.

(But see now stat. 25 & 26 Vict. c. 20, s. 1.)

The superior Courts of common law at Westminster have jurisdiction at common law to issue a writ of habeas corpus ad subjiciendum, to all parts of the dominions of the Crown of England, even to those in which an independent local judicature has been established. Such jurisdiction can be taken away only by express legislative enactment.

Accordingly, this Court granted a writ of habeas corpus directed to certain gaolers and others, in the province of Upper Canada, commanding them to bring up the body of A., a British subject, alleged to be illegally in their custody. *Ex parte Anderson*, 487.

HIGHWAY.

I. General Highway Act, 5 & 6 W. 4, c. 50, s. 95. Justices when have not jurisdiction under, to direct indictment of parish for non-repair of highway.

Stat. 5 & 6 W. 4, c. 50, s. 95, enacts, "that if on the hearing of" a "summons respecting the repair of any highway the duty or obligation of such repairs is denied by the surveyor" of the parish alleged to be chargeable with the repairs "on behalf of the inhabitants of the parish," "it shall then be lawful for" the "justices" in special sessions for the highways, before whom the summons is heard, "and they are hereby required, to direct a bill of indictment to be preferred" "at the next assizes" "against the inhabitants of the parish" "for suffering and permitting the said highway to be out of repair."

Held, that, although where the road alleged to be out of repair is admitted at the hearing to be a highway and to need repair, and only the liability to repair is disputed by the parish, this section renders it imperative on the justices to order an indictment to be preferred, they have no jurisdiction to make such an order, if it appears that the parish has already been acquitted on a similar indictment. *Ex parte Bartlett*, 253.

II. Highway rate, how far auxiliary fund to rates levied under Nuisances Removal Act, 277. NUISANCES REMOVAL ACT, I.

INDIA.

Change of custody of offender convicted by Court-martial in, 338. *HABEAS CORPUS*, II.

INFORMATION.

- I. In nature of quo warranto. Change of venue in, 147. *VENUE*.
- II. Against parish of settlement of pauper, for costs of pauper's maintenance, within what time to be laid, 257. *POOR*, II. 2.

INNKEEPER.

When liable to conviction for gaming, 1. *GAMING*.

INQUEST.

Coroner's, 115, 137. *CORONER*.

INSPECTION.

- I. Of real property, under Common Law Procedure Act, 1854, s. 58, 467. *COMMON LAW PROCEDURE ACT*, 1854.
- II. Of document relied on in pleading by opposite side, 602. *PRACTICE*, II.

INSURANCE.

I. Life.

Against death or injury from accident.
Death from sunstroke not covered.

Defendants, a Company established "for granting assurances against loss of life and personal injury arising from accident at sea," granted a policy to S., the master of a ship then about to proceed on a voyage from England to Aden; whereby it was agreed that in case S. "should sustain any personal injury from, or by reason or in consequence of, any accident which should happen to him upon any ocean, sea, river, or lake," during the continuance of the policy, defendants should pay him a reasonable compensation for such injury; and in case he should die from the effects of such injury within three calendar months from the occurrence of the accident, should pay the sum insured to his executors or administrators. It was further agreed by the policy that no compensation should be payable thereunder by defendants, either to S. or his personal representatives, in respect of injury occasioned to S. by wounds in battle or in any way by the act of the Queen's enemies; or in respect of any injury to which S. should knowingly and without some adequate motive expose himself; but it was declared that, with those exceptions, the policy was intended to secure compensation to S. or his representatives "in the event of his sustaining any personal injury during the said intended voyage, from or by reason or in consequence of any accident whatsoever."

S. then sailed on his intended voyage, and in the course of it arrived in the Cochin river, on the south-west coast of India. Whilst on board his ship in that river, and acting as master of the ship, he was struck down by a sunstroke, to which he did not knowingly and without adequate motive expose himself, and from the effects of which he on the same day died.

In an action by S.'s administratrix on the policy to recover the sum insured from defendants; Held, that defendants were not liable: for that S.'s death could not be said to have arisen from accident, within the meaning of the policy. *Sicclair v. Maritime Passengers' Insurance Company*, 478.

[II. Policy.

Condition waived by non-payment of premium.

S. effected an insurance on the life of B. The policy was headed with these words "Annual premium, 33*l*. whole term, payable by quarterly instalments of 8*l*. 5*s*. each." The policy was dated 2d August, 1856, and recited that "the assured had paid 8*l*. 5*s*. as the premium until 2d November." It then witnessed that "if B. shall die within twelve calendar months from the date hereof, or shall live beyond such period, and the assured shall on or before that period, or before the expiration of every succeeding twelve calendar months, pay the amount of premium," &c., the insurers should be liable; provided, "that if B. shall die before the whole of the quarterly payments shall have become payable for the year, the directors may deduct from the sum insured the whole of the premiums for that year, reckoning it to commence from the 2d of August." B. died after the third quarterly instalment had become payable, but before it was paid. In an action on the policy, the defendant pleaded that the non-payment of this third instalment rendered the policy void:

Held, that the plea was an answer to the action. *Phœnix Insurance Co. v. Sheridan*, H. of L., 763.]

JUDGMENT.

Foreign, in rem. Conclusiveness of, while unreversed, 709. *ACTION*, V.

JURISDICTION.

I. Of superior Courts.

1. Summary, of the Court over its attorneys. Its extent.

The summary jurisdiction of the Court over its attorneys is not limited to cases in which they have been guilty of misconduct such as amounts to an indictable offence, or arises in the ordinary course of their professional practice; but extends to all cases of gross misconduct, on their

part, in any matter in which they may, from its nature, fairly be presumed to have been employed in consequence of their professional character.

B. lent money to an attorney, whom he had previously known and employed as such, on the security of the attorney's promissory note for the amount, and of the deposit by the attorney of a deed of assignment to him of a mortgage on an estate in Ireland, by which a greater amount than B.'s loan was secured to the attorney. The estate getting into the Irish Encumbered Estates Court, the attorney borrowed the deed of B. for the purpose, as he alleged to B., of supporting his claim in that Court, but in reality in order to obtain from that Court payment of the amount secured to him by the deed. Having, by production of the deed to the Court, established his right to that payment, he returned the deed to B., and afterwards received out of Court the whole of the amount which he claimed. He never informed B. of this, but appropriated the whole amount to his own purposes, and continued for several years afterwards to pay B. interest on his loan. He then became insolvent, and B. in consequence lost the whole of the money advanced by him.

Upon these facts the Court, holding that the attorney had been guilty of gross misconduct, suspended him from practising for two years. *In re Blake*, 34.

2. Of Court or Judge in making order for inspection of real property, under Common Law Procedure Act, 1854, s. 51. COMMON LAW PROCEDURE ACT, 1854.

3. Of Courts at Westminster to issue habeas corpus ad subjiciendum to the Colonies, 487. HABEAS CORPUS, III.

II. Of justices.

1. To inquire into circumstances attending an encroachment or enclosure, 7. ENCLOSURE ACTS.

2. To take cognisance of offences committed on sea shore of county, between high and low water mark.

The part of the sea shore comprised between high and low water mark forms part of the body of the adjoining county, the justices of which, and not the Admiralty, have jurisdiction to take cognisance of offences there committed, whether or not committed when the shore is covered with water. *Emblen v. Brown*, 234.

3. To direct indictment of parish for non-repair of highway, 253. HIGHWAY, I.

4. Of Quarter Sessions for borough, to dismiss with costs an appeal, notice of which to the County Quarter Sessions

has been erroneously given, but abandoned. Stat. 12 & 13 Vict. c. 45, s. 6, 561. POOR, II., 3.

III. Of Coroner. CORONER.

IV. Of General Medical Council to erase medical practitioner's name from register, 525. MEDICAL ACT.

LANDLORD AND TENANT.

Tenancy at will.

1. Creation, commencement, and determination of tenancy at will, 149. STATUTE OF LIMITATIONS.

2. Right of landlord, under stat. 11 G. 2, c. 19, s. 1, to follow and seize goods fraudulently removed from premises, to prevent a distress, by tenant at will holding at fixed reserved rent.

Stat. 11 G. 2, c. 19, s. 1, enacts that "In case any tenant" "for life or lives, term of years, at will, sufferance, or otherwise, of any messuages, lands, tenements, or hereditaments, upon the demise or holding whereof any rent is or shall be reserved, due, or made payable, shall fraudulently or clandestinely convey away" "from such premises, his" "goods or chattels, to prevent the landlord" "from distraining the same for arrears of rent so reserved, due, or made payable," the landlord may, within thirty days next after such fraudulent removal, follow and seize the goods as a distress for the arrears of rent due.

A., in May, 1859, entered into an agreement, not under seal, with M., by which M. agreed forthwith to grant A. a valid lease under seal of a house and premises, for three years from 25th May, 1859, at the yearly rent of 84*l.*, payable quarterly. The agreement specified the lessor's and lessee's covenants to be contained in the lease; and it concluded as follows: "It is hereby mutually agreed that these presents shall operate as an agreement only; and that, until a lease shall be executed, the rent, covenants and agreements agreed to be therein reserved and contained shall be paid and observed, and the several rights and remedies shall be enforced, in the same manner as if the same had been actually executed." No lease was drawn up, but A. entered into possession, and remained till a quarter's rent became due, when he fraudulently removed his goods from the premises, to prevent their being distrained.

Held that the agreement, coupled with A.'s entry into possession, made A. tenant at will to M. at a fixed reserved rent, for which M. had a right to distrain; and that, therefore, M. was entitled, under stat. 11 G. 2, c. 19, s. 1, to follow and seize A.'s goods. *Anderson v. Midland Railway Company*, 614.

LICENSE.

- I. Of innkeeper. Offence against tenor of,
1. GAMING.
II. By lord of manor to enclose waste.
STATUTE OF LIMITATIONS.

LIEN.

- I. Right of plaintiff to particulars of lien set up in plea, 602. PRACTICE, II.

[II. Charge of keeping not included in lien.

A person who has a lien upon a chattel for a debt cannot, if he keeps it to enforce payment, add, to the amount for which the lien exists, a charge for keeping the chattel till the debt is paid.

Where such a charge is made, and the owner of the chattel gives notice that he will pay it, but that he protests against the payment, and will seek to recover it back again, he may maintain an action for money had and received for such a purpose.

A shipowner desired to have his ship repaired. On asking a shipwright for an estimate, he received one, the last item of which was "The cost of use of graving dock for the job will be from 190 to 150 guineas." The ship was repaired. When finished, the account was sent in with this item included. No objection was made to this item, but time was required for payment. The shipwright, who claimed and enforced his lien on the ship for payment, urged the removal of the ship, saying that it was unnecessarily occupying his dock, that he had other ships waiting to go in, and finally, that from a certain day he should charge 21*l.* a day for the use of the dock:

Held, these facts did not constitute an implied contract on the part of the shipowner to pay the additional charge, and that (having paid it under protest) he might maintain money had and received to recover it back. *Somes v. British Empire Shipping Co.*, H. of L., 766.]

LIMITATION.

Of actions. STATUTE OF LIMITATIONS.

LUNATIC.

Pauper. POOR.

MALICIOUS PROSECUTION.

ACTION, V.

MANDAMUS.

To Saddlers' Company, to restore Assistant to office, 42. CHARTER.

MARKET.

Right of market company to landing tolls in respect of use of pier adjoining the market 865. TOLL, II.

MASTER.

Of ship. SHIP AND SHIPPING, III.

MASTER AND SERVANT.

- I. Masters and Servants Act, 4 G. 4, c. 34.

Sect. 3. Who is not a servant in husbandry. What is not misconduct in husbandry work.

Stat. 4 G. 4, c. 34, s. 3, enacts "That if any servant in husbandry" "shall contract with any person" "to serve him" "for any time or times whatsoever," "and" "having entered into such service shall" "be guilty of any" "misconduct or misdemeanour in the execution" of his contract, he may be convicted by justices and sent to the House of Correction, with hard labour.

Appellant was employed by respondent under a contract by the terms of which appellant was to keep the general accounts belonging to a farm of respondent, to weigh out food for cattle, to set the men to work, to lend a hand to anything if wanted, and in all things to carry out the orders of respondent. Appellant entered upon the employment, and, in the course of it, was ordered by respondent to go through the whole of the cattle stock under appellant's charge on the farm, and to give particulars of all the animals which had died under his care, and of all bullings and calvings which had taken place. Appellant, having refused to obey this order, was summoned before, and convicted by, justices, under the above enactment, for such refusal.

On appeal against this conviction, held that it was bad. First, because appellant was not a servant in husbandry; secondly, because, assuming that he was such a servant, he had not been guilty of any misconduct or misdemeanour in the execution of his contract to serve in that capacity. *Davies v. Lord Berwick*, 549.

- II. Combination of Workmen Act, 6 G. 4, c. 129.

Sect. 3. What a threat by a workman to his employer, punishable under.

Stat. 6 G. 4, c. 129, s. 3, constitutes it an offence punishable by conviction, "by threats or intimidation, or by molesting or in any way obstructing another," "to force or endeavour to force any" "person engaged in carrying on any trade or business," "to limit" "the number or description of his" "workmen."

Held, that a threat by a workman to his employer, made in pursuance of a combination (which is illegal) between that workman and fellow-workmen to carry it out, that all the workmen so combining will immediately leave work unless the employer discharges other workmen who are then in the same service, renders such workman liable to conviction for the above offence. *Walsby v. Asley*, 516.

- III. Injury to servant through negligence of master while taking part in servant's

work. Liability of master and of his partner.

The principle that a servant sustaining an injury from the negligence of a fellow servant while engaged in the common employment cannot recover in an action against the common master, does not exempt from liability to such an action a master who himself takes part in the servant's work, and whilst so doing injures the servant through negligence.

If the master is a member of a partnership by whom the servant is employed, and the work in which he so takes part is within the scope of the common undertaking of the partnership, his copartners are jointly liable with him for the injury thus caused to the servant by his negligence. *Askwith v. Stansix*, 701.

MAYOR.

Of borough. Precedence of, in the borough, 222. MUNICIPAL CORPORATIONS REFORM ACTS, I.

MEDICAL ACT.

(21 & 22 VICT. c. 90.)

Sects. 15, 17, 26, 29, 46. Jurisdiction of general medical council, under sects. 26, 29, to erase medical practitioner's name from register.

The Medical Act, 21 & 22 Vict. c. 90, by sect. 15 enacts, that every person possessed of one or more of certain specified qualifications shall be entitled to be registered as a medical practitioner on payment of certain fees, and production to the registrar of evidence of his qualification. By sect. 17, every person who was actually practising medicine in England before 1st August, 1815, is entitled to be registered in like manner. By sect. 46, power is given to the General Council of Medical Education (who, by sect. 6, may delegate their powers to the Branch Council) to dispense with such provisions of the Act as they think fit, in favour of, amongst other classes of practitioners, persons acting as surgeons in the public service. Sect. 26 enacts that "no qualification shall be entered on the register, either on the first registration or by way of addition to a registered name, unless the registrar be satisfied by the proper evidence that the person claiming is entitled to it; and any appeal from the decision of the registrar may be decided by the general council;" "and any entry which shall be proved to the satisfaction of" the council "to have been fraudulently or incorrectly made may be erased from the register by order in writing of" the council. And, by sect. 29, "if any registered medical practitioner shall be convicted" "of any felony or misdemeanour," "or shall after due inquiry be judged by the general council to

have been guilty of infamous conduct in any professional respect, the general council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register."

O., a medical practitioner, was registered under sect. 46, by special order of the branch council, on his representation that he was acting as a surgeon in the public service. Subsequently the general council, after holding an inquiry of which he had due notice, and at which he attended under protest but made no defence, erased his name from the register, on the grounds, first, that it was proved to their satisfaction that the entry of it was fraudulently and incorrectly made; secondly, that they, after due inquiry, judged him to have been guilty of infamous conduct in a professional respect.

Held, discharging a rule for a mandamus to the general council to restore O.'s name to the register, that the council had jurisdiction under the circumstances to erase his name: both under sect. 26, the second clause of which was not limited to the case of persons registered under sects. 15 or 17, and under sect. 29, which did not make it a condition to the erasure that the infamous professional conduct of which O. was judged guilty should have been proved to the council to have occurred before his registration. *Regina v. General Council of Medical Education*, 525.

MERCHANT SHIPPING ACT, 1854.

(17 & 18 VICT. c. 104.)

Sects. 19, 107, 257. What proof necessary to procure conviction for offence of harbouring seamen deserting from British ship. Ship how proved British.

The sections coming under the head of "Discipline" in The Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, have reference to British ships alone.

One of these, sect. 257, renders liable to a penalty "every person who wilfully harbours or secretes any seaman or apprentice who has deserted from his ship." Held that, in order to convict an offender under this section, it must be shown that the ship deserted from is a British ship: and that, inasmuch as by sect. 19 "every British ship must be registered," "and no ship" thereby "required to be registered shall, unless registered, be recognised as a British ship," proof that the ship is registered must also be given, either by the production of the original register, or by an examined or certified copy of it, as required by sect. 107. *Leary v. Lloyd*, 178.

METROPOLIS LOCAL MANAGEMENT ACT.

(18 & 19 VICT. c. 120.)

Sects. 158, 159. Apportionment by District

Board of expenses of executing the Act, between the parishes in the district. Discretion of Board. Principles and finality of apportionment.

By the Metropolis Management Act, 1855, 18 & 19 Vict. c. 130, s. 158, every Metropolitan District Board is, by order under its seal, to require the overseers of the several parishes in the district to levy and pay over to the Board the sums which it requires for defraying the expenses of the execution of the Act; distinguishing, in such order, the sums required for sewerage expenses from those required for other expenses under the Act. By sect. 159, if it appears to the Board that all or part of the expenses for defraying which the order is made have been incurred for the special benefit of part, or not for the equal benefit of the whole, of the district, the order may direct the sums, or part of them, required to be levied, to be levied in the part of the district specially benefited, or may exempt any part of the district from the levy, or require a less rate to be levied thereon, as the circumstances may require; and if in the judgment of the Board an entire parish is entitled to exemption, no order need be made on such parish.

Held, that the effect of the Act is to substitute districts for the parishes of which they are composed, for all purposes of management, taxation, and expenditure; not for purposes of management only. That the rates leviable in the component parishes under the orders of a District Board, are raised for the benefit of the whole district, though apportioned between the parishes. That, *prima facie*, the rates ought to be apportioned between the parishes according to their respective rateable value, and not according to the outlay in them respectively; subject to allowances, at the discretion of the Board, in cases falling within sect. 159. That an order of a District Board on a parish, distinguishing between the sums required for sewerage and for other expenses, is good under sect. 158, and is final, if made by the Board after an impartial exercise of the discretion given to it by sect. 159; the decision of the Board, so arrived at, as to the amount proper to be required from a parish, being, even if erroneous, conclusive. *Overseers of St. Botolph Aldgate v. Whitechapel Board of Works*, 89.

[MINERALS AND MINES.

Extent of owner's right in land. Allotment by Commissioners with reference to mines.

Prima facie, the owner of land is entitled to the surface itself, and all below it, *ex jure naturæ*; those who seek to derogate from that right must do so by virtue of some grant or conveyance.

The rights of the grantee of the minerals

depend on the term of the deed by which they are conveyed. Under a grant of minerals, a power to get them is a necessary incident.

In 1770 a private Act of Parliament was passed to provide for the allotment of commons and commonable lands, &c. These lands were described as having mines under the surface. Commissioners were appointed to allot (having due regard to the mines) according to the rights of the various persons interested in the lands, some of which were divided into small parcels. The Commissioners, by their award, allotted the lands, so that some of the mines allotted to A. were situated under portions of the land allotted to B. The persons interested executed this award, which (reciting that this mode of allotment had been necessary) contained a clause, declaring that the proprietors agreed with each other, and their heirs, that the lands so allotted should be lawfully held and enjoyed by the allottees without molestation, and without any mine owner being subject to any action for damages on account of working and getting the mines, or by reason that the lands might be "rendered uneven and less commodious to the occupiers thereof, or by sinking in hollows, and being otherwise defaced and injured where such mines shall be worked . . . the several proprietors having agreed with each other, and being willing and desirous to accept their respective allotments in their several situations hereinbefore declared, subject to any inconvenience or encumbrance which may arise from the cause aforesaid." The mines were worked by A., his assignee, and the surface of the land thereby (but without negligence) injured:

Held, that whatever is the general right in the surface to support, this clause in the award operated as a grant of a right to disturb the surface of the land, and B., therefore, could not maintain an action for damage on that account.

Qu. Whether this clause could operate as a release of the right to support?

The circumstances that (some years after the award, but many more than twenty years before the injury complained of) houses were erected on the land was held not to make any difference with regard to the relative rights of the parties under the award. *Roxbootham v. Wilson*, H. of L., 752.]

MINES.

Under canal. Owner when entitled to work, though he thereby damages the canal, 409. CANAL, II.

MUNICIPAL CORPORATIONS REFORM ACTS.

(5 & 6 W. 4, c. 78; 7 W. 4 & 1 Vict. c. 78.)

- I. 5 & 6 W. 4, c. 76, s. 57. Mayor of borough how far entitled to precedence in it.

The Municipal Corporations Reform Act, 5 & 6 W. 4, c. 76, s. 57, enacts "That the mayor for the time being of every borough shall be a justice of the peace of and for such borough, and shall continue to be such justice of the peace during the next succeeding year after he shall cease to be mayor;" "and such mayor shall, during the time of his mayoralty, have precedence in all places within the borough."

Held, that this section refers to social, not magisterial, precedence; and therefore does not entitle a mayor, during his mayoralty, to take precedence and to preside at all meetings of the borough justices, held in the borough, at which a chairman is required. *Ex parte Mayor of Birmingham*, 222.

- II. 7 W. 4 & 1 Vict. c. 78, s. 14. Sufficiency of description of candidate's Christian name by a well-known contraction, in voting paper for election of aldermen.

Stat. 7 W. 4 & 1 Vict. c. 78, s. 14, enacts that aldermen shall be elected in boroughs by the personal delivery to the mayor or chairman, at the meeting for the election, by each councillor entitled to vote, of a voting paper containing, inter alia, the Christian name and surname of the persons for whom he votes.

Held, that the statute is satisfied if the voting paper contains a contraction of a Christian name which is well known and in ordinary use as representing that name; and that, in such a case, the name need not be written in full. That, therefore, the contractions "Wm." and "Willm." may be used in a voting paper as equivalent to "William." *Regina v. Bradley*, 634.

MUTINY ACT.

For 1857, 20 Vict. c. 13, ss. 1, 38, 40, 41; 338. HABEAS CORPUS, II.

NEGLIGENCE.

Injury to servant through negligence of master while working with him. Liability of master and of his partner, 701. MASTER AND SERVANT, III.

NUISANCES REMOVAL ACT (ENGLAND) 1855.

(18 & 19 Vict. c. 121.)

- I. Sects. 3, 7, 22. Primary liability of houses using sewer to assessment to rate for defraying expense of it, before resort by Nuisances Removal Committee to highway rates as an auxiliary fund. Certiorari when lies, though taken away by statute.

By the Nuisances Removal Act for England, 1855, 18 & 19 Vict. c. 121, s. 22, whenever any drain used for the conveyance of sewage from any house, buildings, or premises, is a nuisance, and cannot, in the opinion of the Local Authority, be rendered innocuous without the laying down of a sewer, the Local Authority are empowered and required to lay down such sewer, and are authorized and empowered to assess every house, building, or premises using the same, to such payment as they shall think just and reasonable. By sect. 3, in a place where a nuisances removal committee constitutes the Local Authority, the surveyors of highways for the time being of such place are made ex officio members of the committee. And by sect. 7, "all charges and expenses incurred by the Local Authority in executing this Act, and not recovered as by this Act provided, may be defrayed" in such a place "out of highway rates, or any fund applicable in aid or in lieu thereof."

A nuisances removal committee having, under sect. 22, laid down a sewer to render innocuous a drain constructed before the passing of the Act by the then surveyors of highways: Held, that whether or not by reason of sect. 7 the highway rates were available as an auxiliary fund towards defraying the expenses thus incurred, the committee were bound, before resorting to that fund, to assess in the first instance, under sect. 22, the houses, buildings, and premises using the sewer.

An order of justices not warranted by the provisions of an Act of Parliament, may be removed into this Court by certiorari, though the Act contains a section taking away the certiorari. *Regina v. Gosse*, 277.

- II. Sect. 22. What is a house 'using' a sewer.

By The Nuisances Removal Act for England, 1855, 18 & 19 Vict. c. 121, s. 22, whenever any drain used for the conveyance of sewage from any house, buildings, or premises, is a nuisance, and cannot, in the opinion of the Local Authority, be rendered innocuous without the laying down of a sewer, the Local Authority are empowered and required to lay down such sewer, and are authorized and empowered to assess every house, building, or premises using the same, to such payment as they shall think just and reasonable.

Under this Act the parish of H. was, in the first instance, divided into four districts. The Local Authority, in 1855, constructed a sewer in one of these, in order to render a nuisance there innocuous; B.'s house, situated there, was assessed to the expense of the construction; and B. paid an agreed composition on the assessment. In 1856 the Local Authority constructed another sewer in a second dis-

trict, in order to render a nuisance in that district innocuous. These two sewers brought down the sewage from the two districts into a third, in such quantities as to greatly increase a pre-existing nuisance there: in order to render which innocuous, the Local Authority, in 1859, constructed a further sewer, running through the third and fourth districts, and, upon its completion, resolved that the drainage of all four districts should form one system, the total costs of the different works be ascertained, and the houses, &c., through all four districts, using the sewers, be equally assessed towards the expenses incurred.

Held that B.'s house, above mentioned, was liable to be re-assessed to such expense as a house "using" the whole sewerage system, within the meaning of sect. 22. *Regina v. Bodkin*, 271.

OFFICE.

Of Assistant in Saddlers' Company. Mandamus to restore to, 42. CHARTER.

OVERSEERS.

Power of, to enforce poor rate made by predecessors. Stats. 43 Eliz. c. 2, s. 4; 17 G. 2, c. 38, s. 11; 574. RATE, I. 2.

PARENT AND CHILD.

HABEAS CORPUS, I.

PARLIAMENT.

Extent of protection of witness examined before Commissioners appointed to inquire into corrupt practices at election for member of, 658. EVIDENCE, I. 1, ii.

PARTNERSHIP.

I. In freight. Liability of one partner to pay demurrage to the other, 203. SHIP AND SHIPPING, II.

II. Liability of partner to servant of the partnership, injured by a copartner in course of work within scope of the partnership, 701. MASTER AND SERVANT, III.

PATENT.

Where the question of novelty or infringement depends merely on the construction of the specification, it is one entirely for the Judge, but where it also depends on other circumstances, such as the degree of difference, or of similitude between two machines, it is a mixed question of law and fact: what the jurymen find to have been done is the matter of fact; but the Judge must apply that fact according to the rules of law, and is entitled and bound to say whether what has been done amounts to an infringement.

The plaintiff took out a patent for an improvement in machinery used for roving cotton. His specification appeared to claim the discovery of the application of

the principle of centrifugal force for such a purpose, but he filed a disclaimer, declaring that he intended to claim only the application of centrifugal force in the particular manner described in the specification:

Held, that taking these two instruments together (*dub.* Lord Wensleydale), they sustained the patent.

The particular manner described was by the use of "a weight." The defendants employed a machine similar in many respects, but, though using weight, or pressure occasioned by weight, as a force, not using "a weight":

Held, that this did not amount to an infringement of the plaintiff's patent; and that the Judge, on seeing this distinction, ought (*dub.* Lord Campbell, C.) so to have directed the jury.

On a trial for the infringement of a patent, the Judge declared his opinion that the specification and disclaimer were sufficient to sustain the patent, but he reserved that question for the Court. A verdict was given for the plaintiff. A rule to enter the verdict for the defendants was obtained, but was discharged. Leave to appeal was granted under the 17 & 18 Vict. c. 125, and the Court added to the leave, "and also on the ground that taking the specification and disclaimer to be good, there was no evidence to go to the jury of infringement." This second point had not been discussed in the Court below. The Court of Exchequer Chamber affirmed the judgment of the Court below on the question of the sufficiency of the specification and disclaimer, but directed a new trial, on the ground that there was no evidence of infringement to go to the jury:

Held, that the Court of Exchequer Chamber had authority to grant a new trial.

The opinion of scientific witnesses as to whether there has or not been an infringement ought not to be received (*per* Lord Wensleydale). *Seed v. Higgins*, H. of L., 725.]

PAYMENT.

By halves of Bank notes, 22. BANK NOTES.

PIER.

Landing tolls at, 365. TOLL, II

PLEADING.

Set off. How far and how far not pleadable to declaration by accommodation acceptor of bill, after paying it, against accommodation drawer, for reimbursement of amount of bill and interest, and of costs of action by the holder against plaintiff.

Declaration that, in consideration that plaintiff would accept, for defendant's accommodation, a bill of exchange drawn

by defendant on plaintiff, and would deliver the same to defendant in order that he might negotiate it for his own use, defendant promised plaintiff to indemnify and save him harmless from any consequent loss or damage. Averment that plaintiff accepted the bill and delivered it to defendant. Breach, that defendant did not indemnify or save harmless plaintiff from loss or damage; and plaintiff, as acceptor, was obliged to and did pay W., the holder, the amount of the bill and interest, and the costs of an action on the bill by W. against plaintiff, as acceptor; and plaintiff also incurred costs and expenses in defending and settling such action.

Pleas. 1. To so much of the declaration as relates to plaintiff's claim in respect of his payment to W. of the amount of the bill and interest; A set-off.

Demurrer. Joinder in demurrer.

2. To so much of plaintiff's claim as relates to the costs of the action brought by W. against plaintiff, and the costs and expenses incurred by plaintiff in defending and settling the said action; That the whole of the said costs and expenses were incurred by plaintiff at defendant's request: concluding with a set-off.

Replication thereto, That the said costs and expenses were not, nor was any part thereof, incurred at defendant's request as alleged.

Demurrer. Joinder in demurrer.

Held, that the first plea was good, for that plaintiff's claim in respect of the amount of the bill and interest was a liquidated demand, capable of being ascertained with precision at the time of pleading; and was separable from the rest of the claim, though mixed up with it in one count. That the second plea was bad, being pleaded to costs and expenses incurred by plaintiff, but not paid, and therefore not constituting a liquidated demand to which a set-off could be pleaded. *Crampton v. Walker*, 321.

POOR.

I. Settlement.

1. By renting a tenement.

i. Requisites to "a separate and distinct dwelling-house" within stat. 6 G. 4, c. 57, s. 2.

C. rented and occupied the ground floor of a house, consisting of a shop and two small rooms. Access to the shop and the rooms was gained by room doors opening out of a passage. This passage led through the house from the street in front to a yard at the back, and was closed by the house front door at one end and a back door at the other. K. rented and occupied the upper floor; access to which was gained by an outside staircase leading from the backyard. The bottom of this staircase

was situated just outside the back door of the passage; and K. could gain it either from the rear of the house in the first instance, or by entering at the front door and passing through the passage to the rear. C. and K. each had a key of the front door, which door, and the passage, both of them used at pleasure, and they each kept clean a distinct half of the passage. Both front and back doors of the passage were kept closed at night.

Held, that the floor rented and occupied by C. was not "a separate and distinct dwelling-house" within stat. 6 G. 4, c. 57, s. 2, and that, therefore, C. did not gain a settlement by renting it. *Regina v. Elswick*, 437.

ii. Settlement not gained by Wesleyan minister paying rent and taxes for house taken for him by the stewards of his circuit, who reimburse him. Stats. 6 G. 4, c. 57, s. 2; 1 W. 4, c. 18, s. 1; 4 & 5 W. 4, c. 76, s. 66.

By the practice of a Wesleyan congregation, certain of its members were appointed stewards for a given circuit, and were called circuit stewards. One of their duties was to take and furnish houses for their ministers officiating within the circuit. The rents of such houses were sometimes paid by the circuit stewards, and sometimes by the ministers; if by the ministers, the stewards repaid them the amount, together with the amount of the rates and taxes in respect of the houses, which were paid by the ministers in the first instance. It was the custom of the congregation to appoint a minister to officiate in a given place for one year certain, during which he could not be removed; and no minister officiated for more than three years in the same place.

At Michaelmas, 1832, the circuit stewards took and furnished a house at C., a place in the circuit, for a year certain, at the rent of 20/., as a residence for W., who was then appointed to be minister at C. W. immediately took possession and occupied the house, as minister, till Michaelmas, 1835. During the three years of his occupation, W. paid the annual rent of 20/., for the house to the landlord: he was also in each of those years assessed to and paid the poor-rates for C. Both rent and poor-rates, however, were repaid to him by the circuit stewards.

Held, that W. did not gain a settlement in C. by renting a tenement, or by assessment to and payment of rates and taxes, under stats. 6 G. 4, c. 57, s. 2; 1 W. 4, c. 18, s. 1; and 4 & 5 W. 4, c. 76, s. 66. *Regina v. Overseers of Tiverton*, 555.

2. By residence.

Order of justices adjudging settlement of pauper lunatic, under stat. 16 & 17 Vict. c. 97, s. 97. Effect of sect. 102

Acquisition by unemancipated pauper lunatic of status of irremovability, under stats. 9 & 10 Vict. c. 66, 11 & 12 Vict. c. 111.

On 17th October, 1854, J. R., who was then eighteen years old and living, unemancipated, with his father, T. R., in the parish of A. in the S. Union, was removed as a lunatic pauper to an asylum, where he had since continued. At that time both T. R. and J. R. had resided in A. for more than the five next preceding years. T. R. continued to reside there till 1857, when he left, and had not since returned.

T. R.'s settlement, both on and since 17th October 1854, was in the parish of G. J. R. was maintained in the asylum from that date, at the cost of the S. Union, until, it being discovered that T. R. had left A., an order of justices was, on 11th October, 1859, made under stat. 16 & 17 Vict. c. 97, s. 97, adjudging J. R. to be settled in G., and ordering G. to pay the preceding twelve months' expenses of his maintenance, and a weekly sum for his future support. Sect. 102 of that Act provides that all expenses incurred for the removal, maintenance, &c., of a pauper lunatic removed to an asylum, "who would at the time of his being conveyed to such asylum" "have been exempt from removal to the parish of his settlement" "by reason of some provision in" stat. 9 & 10 Vict. c. 66, "shall be paid by the guardians of the parish wherein such lunatic shall have acquired such exemption," "and where such parish shall be comprised in any Union the same shall be paid by the guardians, and be charged to the common fund of such Union;" "and no order shall be made under any provision" "in this" "Act on the parish of the settlement in respect of any such lunatic pauper."

On a case stated for this Court on an appeal to Sessions by G. against the order of 11th October 1859: Held, that stat. 16 & 17 Vict. c. 97, s. 102, applied, and the order was therefore bad. That J. R. was, at the time of his being conveyed to the asylum, exempt from removal to G. by reason of a provision in stat. 9 & 10 Vict. c. 66, with which the amending statute 11 & 12 Vict. c. 111, was to be read as one: and had himself, though not *sui juris*, acquired such exemption in A. *Regina v. Overseers of St. Giles*, 224.

II. Removal.

1. Exemption from removal, under stats. 9 & 10 Vict. c. 66, and 16 & 17 Vict. c. 97, s. 102, of unemancipated pauper lunatic, 224. *Poor*, I. 2.

2. Stats. 4 & 5 W. 4, c. 76, ss. 79, 84, 99; 11 & 12 Vict. c. 43, ss. 11, 85. Order on parish of settlement for costs of maintenance of pauper removed under order of removal. Time for laying information for such costs by relieving

parish. Extent of liability of parish of settlement. Notice of chargeability.

Stat. 4 & 5 W. 4, c. 76, s. 84, enacts, "That the parish to which any poor person whose settlement shall be in question at the time of granting relief shall be admitted or finally adjudged to belong shall be chargeable with and liable to pay the cost" "of the" "maintenance of such poor person, and such cost" "may be recovered against such parish in the same manner as any penalties or forfeitures are by this act recoverable:" provided that such parish shall pay to the relieving parish such cost from such time only as notice that the poor person has become chargeable shall have been sent by the relieving parish to the parish of settlement. By sect. 79 no poor person is to be removed, under an order of removal, until twenty-one days after written notice of his being chargeable has been sent by the relieving parish to the parish of settlement, have elapsed without an appeal by the latter parish against the order of removal. By sect. 99, penalties and forfeitures under the Act are made recoverable by information before justices and their order thereon, no time being limited for laying the information.

Stat. 11 & 12 Vict. c. 43, s. 11, enacts, "That in all cases where no time is" "specially limited for" "laying any" "information in the Act" "of Parliament relating to each particular case," "such information shall be laid within six calendar months from the time when the matter of such" "information" "arose." By sect. 33, "Nothing in this Act shall extend or be construed to extend to any warrant or order for the removal of any poor person who" "shall become chargeable to any parish."

An order having been made for the removal of a female pauper, written notice of her chargeability was sent by the relieving parish to the parish of settlement, which did not appeal against the order of removal. At the date of the order the pauper was pregnant, though not unable to bear removal. She so continued for some months, and was not actually removed till after her delivery, and five months after the service of the notice of chargeability. Nearly six years after her removal, the relieving parish laid an information before justices against the parish of settlement, for the cost of her maintenance from the time of the service of the notice of chargeability to that of her actual removal: and the justices made an order for the full amount.

On appeal by the parish of settlement against this order: held, First, that the relieving parish was entitled, under stat. 4 & 5 W. 4, c. 76, ss. 79, 84, and 99, to the cost of the pauper's maintenance only for the twenty-one days next after the ser-

vice of the notice of chargeability. Secondly, that the information on which the order was founded was laid too late, by reason of stat. 11 & 12 Vict. c. 43, s. 11; and was not within the exemption in sect. 35. *Hill v. Thornecroft*, 257.

3. Notice of appeal against order of removal, to wrong Sessions. Its validity. Jurisdiction of right Sessions, under stat. 12 & 13 Vict. c. 45, s. 6, to dismiss appeal with costs, at instance of respondents, to whom appellants, who do not appear, have given notice of abandonment of the appeal to the wrong Sessions.

Overseers of a parish, on which an order of removal of a pauper had been made by two borough justices, gave notice of an appeal against the order to the next Quarter Sessions for the county in which the borough was situate. The borough had a separate Court of Quarter Sessions, which alone had jurisdiction to hear the appeal. The day before the Borough Sessions next after the notice of appeal were held, the appellants gave notice to the respondents that, finding that the Sessions for the county had no jurisdiction, they abandoned the appeal. The appellants did not appear, and the respondents did, at the Borough Sessions; which Court, on the application of the respondents, dismissed the appeal, and made an order for the payment by the appellants to the respondents of the costs incurred by the latter in the appeal.

Held, discharging a rule for a certiorari to bring up this order, that the order was rightly made. That the Borough Sessions would have had jurisdiction to hear the appeal, if persisted in; the erroneous statement in the notice of appeal that the appeal would be made to the County Sessions being merely surplusage: and that, upon the abandonment of the appeal, the Borough Sessions had jurisdiction under stat. 12 & 13 Vict. c. 45, s. 6, to make the order. *Regina v. Recorder of Leeds*, 561.

III. Rate. RATE, I.

POSSESSION.

Adverse. STATUTE OF LIMITATIONS.

POWER OF SALE.

VENDOR AND PURCHASER.

PRACTICE.

I. On making order, by Court or Judge, for inspection of real property, under Common Law Procedure Act, 1854, s. 58, 467. COMMON LAW PROCEDURE ACT, 1854.

II. Right to inspection of document, and particulars of lien, relied on in pleading by other side.

Detinue for title deeds. Plea, on equitable grounds, that before the detention,

and in the lifetime of M. P., since deceased, through whom plaintiffs claimed, the deeds belonged to M. P., who agreed with J. N. to deposit them with him, by way of equitable mortgage to secure the repayment of money lent by him to M. P. That from the time of that agreement to his death, J. N. held the deeds on the terms aforesaid; and died, having appointed defendants executrices of his will, which they proved. That thereupon the deeds came into, and thence till action brought continued in, the possession of defendants as such executrices; and that none of the money lent by J. N. to M. P. had ever been paid. That, therefore, defendants detained and detain the deeds; which was the detention in the declaration mentioned.

Plaintiffs, who were trustees of M. P.'s marriage settlement and also her executors, administered interrogatories to defendants, who, in answer, admitted that they had in their possession a memorandum of a specified date, signed by M. P., agreeing that the deeds should remain in the custody of J. N. till repayment of the moneys advanced by him to M. P.

Held that plaintiffs, on an affidavit stating that they were entirely ignorant of the said memorandum, and had no means of ascertaining anything of its contents, and that it was material and necessary, in order to prosecute the action, that they should have inspection of it, were entitled to inspection of the memorandum, and also to be furnished by defendants with particulars of the lien or mortgage on the deeds relied upon by them. *Owen v. Nickson*, 602.

III. Change of venue in quo warranto, 147. VENUE.

PRINCIPAL AND AGENT.

Liability of English agent for foreign charter, 495. SHIP AND SHIPPING, IV.

PRISON.

Proper, for offender sentenced by Indian Court-martial, 338. HABEAS CORPUS, II.

PROHIBITION.

Lies to Criminal Court, 115. CORONER, I.

QUARTER SESSIONS.

Jurisdiction of, to dismiss appeal, where notice of appeal to other and wrong Sessions has been given but abandoned. Stat. 12 & 13 Vict. c. 45, s. 6, 561. POOR, II. 3.

QUO WARRANTO.

Change of venue in, 147. VENUE.

RAILWAY.

How rated to poor rate. RATE, I. 1, iv. v.

RATE.

I. Poor rates.

1. Principles of rateability.

- i. What principle erroneous, for ascertaining rateable value in a parish, of the part of apparatus, there situate, of a waterworks Company.

The pipes and reservoirs of a Waterworks Company were so placed in the several parishes in which they were respectively situate, that the whole together formed one apparatus for the supply of water, in some only of such parishes, to the customers of the Company; a part of such apparatus being rateable to the poor rate in each parish.

Held, that it was not a correct principle, in order to ascertain the rateable value of the apparatus in any one particular parish, to calculate the total rateable value of the whole apparatus in all the parishes, and then divide that value among the several parishes, according to the quantity of land occupied by the apparatus in each of them. *Regina v. Overseers of Putney*, 108.

- ii. Rateable value of canal and adjoining lands. Construction of local Act, (30 G. 3, c. lxxxii. s. 67.)

The Act incorporating appellants, a canal Company, provided that the Company should "from time to time be rated to all parliamentary and parochial rates and assessments for and in respect of the lands and grounds to be purchased or taken by the" "Company" "in pursuance of" the "Act, in the same proportion as other lands lying near the same are or shall be rated, and as the same lands and grounds so to be purchased or taken would be rateable in case the same were the property of individuals in their natural capacity."

In pursuance of the Act, the Company purchased lands and made the canal. At that time the lands adjoining those so purchased were let for use as mere land; but they afterwards greatly increased in value, and at the time that the rate now appealed against was made, were extensively built over, and worth, if let for the purpose of being built on, 6d. per annum the square yard. The average rateable value, at the time of making the rate, of the nearest land to the canal which was then still used as mere land, was about 3d. per acre per annum. Upon other land adjoining the canal, wharfs, yards and buildings had before then been erected, the average rateable value of which was then 5d. the square yard.

On a case stated for the opinion of this Court by Sessions, on an appeal by the Company against a poor-rate made by respondents, for a parish in which part of the canal was situate, to which appellants

were assessed in the same proportion as the lands lying near the canal were rated, as occupied at the time the rate was made: Held, that appellants were not rateable in proportion only to the rateable value of the whole of the lands adjoining the canal, considered as mere land; but that the true principle of their rateability was that the adjoining land covered with buildings should be brought into hotchpot with the adjoining lands of other descriptions, and that appellants should be rated for the land occupied by the canal according to the aggregate value, at the time of making the rate, of the whole land brought into hotchpot: that value being the rent which a tenant from year to year would give for the whole; in estimating which, regard was to be had to that proportion of the rent paid by the tenant of any building standing on the land, which he might be supposed to pay in respect of its site as enhanced in value, beyond the uncovered land, by being built upon. *Regina v. Glamorganshire Canal Company*, 186.

- iii. Owner of whole house, occupying beneficially, as a subject, not exempt from rateability though he performs duties therein as servant of the Crown, and allows other servants of the Crown, as such, to use it.

Appellant, distributor of stamps at C., rented a house there at 52l. 10s. per annum. By agreement with the Commissioners of Inland Revenue he let five principal rooms and a closet, in this house, for the use of the surveyor of taxes and of the collector of Inland Revenue for C. By the agreement, possession was to be given and rent to commence at a given time, and appellant was to be paid "the annual consideration of 90l.; this sum to include all expenses, namely, rent, rates, taxes, gas, wood, coals, also providing a trustworthy person to reside on the premises, to keep clean, light fires, and attend to the same." One other room in the house was occupied by appellant as an office for vending stamps and transacting other public business connected with his duties as stamp distributor. He employed an assistant in this room, who also took in there for him private orders for printing, which he executed elsewhere. The remainder of the house, consisting of two kitchens and a cellar on the basement, and a sitting room and two bedrooms on the second floor, was occupied by a man and his wife and daughter, under an agreement by which appellant, besides allowing him to live rent free, paid him 6l. 10s. yearly and found him with coals and candles; he in return cleaning the rooms and lighting the fires. Appellant exhausted, annually, the whole of the 90l. payable to him under the first mentioned agreement, with the exception of 2l. 10s., in paying

his own rent; the expenses of coal, fuel and gas; the wages of the man before mentioned; and other incidental expenses.

On a case stated for this Court, on an appeal by appellant to Sessions against a poor-rate for C. to which he was rated on the full annual rateable value of the whole house: Held, that appellant was properly rated; for that he was the beneficial occupier of the whole house in his capacity as a subject. That the five rooms and closets were not in the separate possession of the revenue officers; and the fact that appellant's benefit, in respect of that part of the house, was derived from payments made to him by servants of the Crown for privileges given to them in that capacity, did not exempt him from rateability: and that the room occupied by appellant himself was not occupied by the Crown through him as its servant. *Smith v. Overseers of St. Michael, Cambridge*, 383.

iv. Deductions allowable from rateable value of railway line, stations and buildings in a township.

Deductions from rateable value held allowable to a railway Company, upon assessment to poor-rate, in respect of the portion of their line passing through, and of the station, buildings and sidings within, a township, on the following principles.

1. That the percentage amount to be allowed the Company for interest on capital and tenant's profits was to be calculated upon the depreciated value of the rolling stock at the time the rate was made, not upon its cost price.

2. The Company being obliged to provide (in addition to the rolling stock), turntables, cranes, weighing machines, stationary steam-engines, lathes, electric telegraph and apparatus, office and station furniture, and gas works used for supplying the stations with gas: Held, that a deduction should be allowed for interest on capital and tenant's profits, in respect of such of these articles as were movable; for instance, the office and station furniture: but not in respect of such of them as were either so attached to the freehold as to become part of it, or, though capable of being removed, were so far attached as that it was intended that they should remain permanently connected with the railway or the premises used with it, and remain permanent appendages to it, as essential to its working.

3. It being necessary, in order to carry on the business of the railway, that the Company should have in hand, at command, a sum of money by way of floating capital, for providing surplus stores (as rails, sleepers, &c.), to be used in case of accident on the line, or other emergency, and partly for paying the wages of servants of the Company and other

current expenses: Held, that the question whether a deduction should be allowed, for interest and tenant's profits, or either, upon this floating capital, must depend on whether, on the whole capital employed, a greater delay occurred in realizing the returns than is ordinarily incident to the employment of capital. That a deduction was allowable in respect of any such delay, but not in respect of a delay in realizing the profits on a part only of the capital, if compensated by the more than ordinary quickness of the return on the rest.

4. That the deduction to be allowed in respect of the stations, buildings and sidings along the line, must be calculated on the actual value at which they ought to be assessed, and not upon the original cost of construction. *Regina v. North Staffordshire Railway Company*, 392.

v. Rateable value of railway station for use of which the occupying Company receives a higher annual payment than could be obtained as rent for it from a tenant from year to year.

Appellants, a railway Company, being the sole proprietors and occupiers of a railway station on their line, in 1848 entered into an agreement with another railway Company, by which the latter were, for a certain annual payment, to have for 999 years the joint use of the station for their traffic, appellants continuing to be occupiers of the station, subject to such use. In 1859, the annual value of the station having then from various causes fallen very much below the sum paid annually to appellants, under this agreement, by the other Company, appellants were assessed to a poor-rate in respect of the station, on the full sum so paid to them.

In a case stated for this Court, on an appeal by appellants to Sessions against this rate, on the ground that the rateable value of the station was not the rent actually paid but the rent which could be actually obtained for it from a hypothetical tenant from year to year, it was stated as an admitted fact that appellants were the persons rateable in respect of the whole occupation of the station. Held, that appellants were properly rated on the full amount paid by the other Company; appellants being sole occupiers of the station, subject to an easement by the other Company, and the payment being a profit arising out of appellants' occupation. *Regina v. Fletton*, 450.

2. Recovery of.

Duty of justices to enforce rate by distress warrant, at instance of overseers, successors to those who made the rate. *Stats. 43 Elis. c. 2, s. 4; 17 G. 2, c. 38, s. 11.*

Stat. 43 Elis. c. 2, s. 4, empowers "as

well" "the present as subsequent" "overseers, or any of them," by warrant from two justices, to levy all arrears due for poor-rate, by distress and sale of the offender's goods. Stat. 17 G. 2, c. 38, s. 11, enacts that, in case any person shall refuse or neglect to pay the overseers by whom a poor-rate is made, any sum at which he is legally rated, "the succeeding overseers" may levy such arrears, and out of the money so levied reimburse their predecessors all sums of money expended by them for the use of the poor.

Held, that the latter statute does not restrict the power conferred by the former to overseers immediately succeeding those by whom a poor-rate is made, but that any overseers, subsequent to those making the rate, are still entitled to procure a distress warrant from justices to enforce payment of arrears of the rate by defaulters. *Overseers of East Dean v. Everett*, 574.

II. Under Nuisances Removal Act. NUISANCES REMOVAL ACT.

REMOVAL.

Order of. Poor, II.

SADDLERS' COMPANY.

Charter and by-law of. Disqualification of bankrupt or insolvent for office of Assistant, 42. CHARTER.

SALE.

Of real property, 685. VENDOR AND PURCHASER.

SEASHORE.

Between high and low water mark, is part of adjoining county, 234. JURISDICTION, II. 2.

SERVANT.

MASTER AND SERVANT.

SET-OFF.

PLEADING.

SHIP AND SHIPPING.

I. Ship how proved British, 178. MERCHANT SHIPPING ACT, 1854.

II. Construction of contract of shipment between charterer of ship and shipper of goods on board. Liability of such shipper to charterer for demurrage, though contract creates partnership in freight between them.

Plaintiff, having chartered a steamer, agreed with defendants to take out some engines in her to Barcelona, it being known to both parties that the engines could not be shipped unless some alterations were made in her hatchways. The agreement contained the following conditions. First: that plaintiff should lay the

steamer on her berth at Liverpool for Barcelona. Secondly: that she should not be required to lie on her berth longer than ten days. Thirdly: that she should make the voyage from there to Barcelona for the lump sum of 650*l.*, plaintiff to pay all charges. Fourthly: that defendants should load in the steamer two engines and tenders complete, for 240*l.*, freight to be paid at Liverpool on delivery of bills of lading, without any deduction for interest or insurance. Fifthly: that such of the above goods as weighed above 20 cwt. should be put in the steamer, stowed, taken out and landed at shipper's risk and expense. Sixthly: that the said goods should be taken out of the steamer as soon as the captain was ready to deliver them, in five days, Sunday excepted; and 20*l.* sterling demurrage to be paid by the shipper or receiver of the said goods, for every day that she was detained over and above five days. Seventhly: that the steamer should be entered in the joint names of plaintiff and defendants, so that the latter might assist to get cargo. Eighthly: that any surplus of freight above 650*l.* should be divided between plaintiff and defendants, and also any loss which might result. Ninthly: that the said steamer should guarantee to carry 480 tons dead weight, besides 40 tons of coal in the bunkers. Tenthly: that the bills of lading for the whole cargo of the said steamer should be signed at the office of plaintiff. Eleventhly: that the steamer should be consigned at Barcelona to the friends of defendants, paying 2*l.* commission on the above freight.

The steamer was put on her berth at Liverpool, and, by consent of her owner, the beams in her hatchways were removed, for the stowage of the engines, at the joint expense of plaintiff and defendants. The engines, which exceeded 20 cwt. in weight, were then brought alongside; and it was found, before ten days had expired, that they would not go down the hatchways, notwithstanding the removal of the beams. The consent of the shipowner to the further widening of the hatchways was thereupon obtained, on condition that the ship should, before sailing, be made right, to the satisfaction of Lloyd's surveyor. In consequence of the necessary delay for widening the hatchways and making the ship thus right, she lay on her berth thirteen days beyond the stipulated ten.

Plaintiff having brought this action, on the second clause of the agreement, for demurrage in respect of the detention by defendants of the ship on her berth beyond ten days: Held, that defendants were liable on that clause, it being collateral to and independent of any partnership in the freight; assuming that the agreement constituted a partnership to some extent between the parties in that respect.

The Judge directed the jury that, by reason of the 5th clause of the agreement, defendants were liable for any detention of the ship necessary to effect such alterations in her as would enable the engines to be put on board by defendants. Held a right direction. *Bleck v. Balleras*, 203.

III. Authority of master to tranship, in port of distress, goods which are on board under charter-party; in order that they may be forwarded to destination. Whose agent he is in making fresh charter-party, at higher rate of freight, with master of substituted ship. Amount of freight payable by consignee of the goods. Transfer of lien for freight from original to substituted shipowner. Extent of such lien. Right of consignee to deduct from freight advances to master of original ship.

Defendants, London merchants, by charter-party made between them and C., the master of the ship *Planter*, chartered that ship to bring a cargo of guano from Callao to England. The ship was, by the charter-party, consigned outwards to defendants' agents in South America; and freight at 70s. per ton was made payable on her arrival in England, deducting such advances on account of freight as charterers' agents might, as the charter-party empowered them, make to C. in the Pacific. The *Planter* arrived at Callao, loaded her cargo of guano, and set sail for England, defendants' agents having, previously to her sailing, made large advances to C. on account of freight. Soon after sailing she sprang a leak, which compelled her to put back to Callao, and she arrived there the second time, consigned to a firm independent of defendants or their agents. It was then found that she could not proceed on her voyage, and C., defendants' agents refusing to interfere, transhipped the cargo into another ship, *The Alarm*, to be forwarded to England. For this purpose a charter-party was entered into between plaintiff, the master and apparent owner of *The Alarm*, and C. in his own name; under which freight was made payable by the consignee, on ship's arrival in England, at 70s. per ton. Plaintiff then made out bills of lading, in which C. was named as shipper and defendants as consignees. At the date of this latter charter-party the current rate of freight at Callao was only 40s. per ton, and it was agreed between plaintiff and C. that plaintiff should pay the difference between that and the charter-party freight to C., but whether for C.'s benefit or that of his owners did not appear. The cargo arrived in England, in *The Alarm*; when plaintiff claimed from defendants the full freight of 70s. per ton; from which defendants, on the other hand, insisted on their right to deduct the advances made to C. by their agents at Callao. Defendants

having paid the freight less the amount of such advances, plaintiff brought this action to recover that amount.

A verdict having been taken, by consent, for plaintiff, for this amount, leave being reserved to defendants to move to enter it for them, the Court to have power to draw inferences of fact from the above facts, which were proved at the trial: Held, making absolute a rule to enter the verdict for defendants: First, that the proper inference from the facts was that C. made the charter-party with *The Alarm* as agent for his owners and not for defendants; the agreement by plaintiff to return him part of the charter-party freight being a legitimate transaction in that view, but a gross fraud on defendants, to which plaintiff was a party, in the other. Secondly, that assuming C. to have made the said charter-party as defendants' ostensible agent, he had no implied authority, from the necessity of the case, on transshipping the cargo, to bind defendants to payment of a higher than the current rate of freight; and plaintiff had knowledge of that want of authority. Thirdly, that, apart from *The Alarm* charter-party, plaintiff had no lien on the cargo for a greater amount of freight than the balance due after crediting defendants with the advances to C.; or that assuming (a point which the Court did not decide), that upon a transshipment of cargo arising from necessity, in a port of distress, in order to its being forwarded to its destination, the original shipowner can transfer his lien for freight to the substituted shipowner, he can transfer no greater right of lien than he himself possesses. *Matthews v. Gibbs*, 202.

IV. Extent of liability, in respect of shipment of cargo, of agent for foreign charterer, entering into charter-party which provides for its cessation.

By a charter-party made between plaintiffs, shipowners, and defendants, agents in England for foreign charterers, it was agreed that plaintiffs' ship the *B.* should proceed to J., and there load in regular turn, in the customary manner, from defendants, a full and complete cargo of coke. It was further agreed that, as defendants were acting for foreign principals, "all liability of" defendants "in every respect, and as to all matters and things, as well before and during as after the shipping of the said cargo," should "cease as soon as they" had "shipped the cargo."

Defendants having loaded and shipped the agreed cargo, plaintiffs afterwards sued them in this action for not having shipped it in regular turn. Held, that the action would not lie, for that the charter-party limited defendants' liability to the actual shipment of the cargo, and protected them

from responsibility for any irregularity or delay in the shipment. *Milvain v. Perez*, 495.

STATUTE.

Construction of.

General words "Any other persons whomsoever," not restricted in meaning by following words which describe particular persons. Liability, in consequence, of all persons to be called upon to give evidence before committee of justices appointed to prepare basis for county rates. Stat. 15 & 16 Vict. c. 81, ss. 2, 5, 7, 8.

Stat. 15 & 16 Vict. c. 81, by sect. 2, empowers the justices of a county to appoint a committee of their body for the purpose of preparing a basis or standard for fair and equal county rates, to be founded on the full and fair annual value (interpreted by sect. 6 to mean the net annual value) of the property rateable to the poor-rate in every parish in the county. Sect. 5 empowers this committee to order, in writing, certain specified parish officers and other persons, having the custody or management of any public or parochial rates or valuations of the parishes, to make written returns to the committee of the amount of the full and fair annual value of the property in any parish liable to be assessed toward the county rate; the date of the last valuation for the assessment of such parish; and the name of the surveyor or other person by whom such valuation was made. By sect. 7 the committee may, by their order in writing, require the "overseers of the poor, constables, assessors, collectors, and any other persons whomsoever, to appear before them," "and to produce all parochial and other rates, assessments, valuations, apportionments, and other documents in their custody or power relating to the value of or assessment on all or any of the property within the several parishes" "which may be liable to be assessed toward the county rate, and to be examined on oath" "touching the said rates, assessments, valuations, or apportionments, or the value of property aforesaid." By sect. 8, "every person who shall neglect or refuse to appear when required so to do as aforesaid, or to be sworn or examined, or to produce such documents as hereinbefore provided," is subjected to a penalty not exceeding 20*l.*, recoverable before justices.

Held, that sect. 7 authorizes the committee to call before them all persons whomsoever, able to give evidence of, and produce any documents relating to, the actual annual value of the property to be assessed to the county rate; and does not restrict the committee to ascertaining, by the examination of the persons, and the inspection of the documents, specified in sect. 5, the amount at which the property

is rated to the poor-rate. That therefore a person having in his possession private accounts and documents relating to the annual value of collieries and coal-mines assessable to the county rate, and able to give evidence touching their net annual value, incurs the penalty under sect. 8 by refusing to obey an order of the committee, under sect. 7, for his appearance before them with such accounts and documents. *Regina v. Doubleday*, 501.

[STATUTE OF FRAUDS.

Sufficient memorandum.

One paper referring to another, in which the terms of an agreement are stated, will constitute a contract sufficiently executed according to the provisions of the Statute of Frauds; but where the first paper was in these words, "I agree to let the premises in G. L., containing three stables, &c., for the same rent and subject to the same conditions that I hold them myself;" it was held (Lord Campbell, Lord Chancellor, *dis.*) that this paper, even though ratified by the proposed lessee, as it did not state the duration of the term, did not contain enough to constitute a memorandum of an agreement sufficient to satisfy the statute.

In the Court of Queen's Bench, in an action on an agreement, the questions discussed were, one of fact, what the parties had said and written to each other, and one of law, what was the construction to be put on two letters of the Defendant, which were relied on as a ratification of what his agent had done. In the Exchequer Chamber (upon the proceeding by appeal under the Common Law Procedure Act), the judgment of the Court was given on the ground that even if the Defendant's letters amounted to a ratification, it was null, for that the paper ratified did not contain a memorandum of agreement sufficient to satisfy the Statute of Frauds:

Held, that it was competent to the Court of Exchequer Chamber to adopt that ground for its judgment. *Fitzmaurice v. Bailey*, H. of L. 772.]

STATUTE OF LIMITATIONS.

As to real actions.

Stat. 3 & 4 W. 4, c. 27, ss. 2, 7, 15. Possession of land under conveyance intended, but ineffectual, to pass fee, not adverse. Possession under tenancy at will. Creation and determination of such tenancy.

On 21st August, 1781, the lord of a manor, with the consent of certain of the tenants, granted to five persons, two of whom were the churchwardens and overseers of the parish of M., license to enclose 3*a.* 2*r.* of the waste of the manor; and that they and their heirs, and all per-

sens claiming under them, should and might lawfully hold the same, so enclosed, in trust for the purpose of building a workhouse for the poor of M.; rendering to the then lord and to all other lords of the manor the yearly rent of 5s. for the same in every year for ever. This grant was not according to any custom in the manor, nor was there any such custom. The churchwardens and overseers of M. immediately took possession of the land the subject of the grant, and built on it a workhouse which, up to Midsummer, 1838, was used as such; and possession of the workhouse and land was retained by the churchwardens and overseers, or persons claiming through them, from 1781 to 1840, when they were surrendered to the then lord of the manor, as hereafter mentioned. In 1817, the churchwardens and overseers of M. also took possession of 2r. 10p. of land, contiguous to that granted in 1781; and retained possession of this additional land also from 1817 to 1840. The five persons nominated as trustees of the original land by the grant of 1781 all died before 1817, and no heir of the survivor came in to claim admittance to it, after due proclamations in the manor Court calling upon him to do so. In October, 1835, the then steward of the manor gave notice to the churchwardens of M. to nominate other trustees in the stead of those deceased, in order to their admittance at the next manor Court, to save a forfeiture. In compliance, the vestry of the parish nominated seven fresh trustees, who, on 27th October, 1835, were admitted to both pieces of land at a manor Court; the parish paying a fine to the lord and the lord granting the land to the seven persons and their heirs, to hold by copy of court roll and at the will of the lord, on the same trusts as in the grant of 1781, and at the same yearly rent of 5s. From the accounts of a deceased steward of the manor, it appeared that this rent was paid to the lord from 1781 to 1791, and from the parish books of M. it appeared that it was also paid from 1825 to 1836. In January, 1840, the vestry of M. passed a resolution that, there being no further use for the premises as a workhouse, the land should be forthwith surrendered to the then lord of the manor by the churchwardens and overseers, and the trustees appointed in 1835. And in February, 1840, that surrender was made to the then lord of the manor, the surrender comprising, in terms, the first piece of land only, but possession being given to the lord not of it only, but also of the other. The lord, by himself or by persons claiming under him, held undisturbed possession of both pieces of land from February, 1840, to the time of the present action.

On a case stated, in an action of ejectment brought, on 16th February, 1859,

by the churchwardens and overseers of M., to recover both pieces of land from defendants, who were in possession and claimed under the lord of the manor of 1840, power being reserved to the Court to draw inferences of fact: Held, that plaintiffs were not entitled to recover either piece of land. As to the original piece, that the possession by plaintiffs under the grant of 1781 was at the outset permissive, and had not, down to and at the time of the passing of stat. 3 & 4 W. 4, c. 27 (July, 1833), become adverse; plaintiffs having, from 1781 down to that time, held either as tenants at will or, at most, as tenants from year to year of the lord. That such tenancy was determined by the admittance of the fresh trustees for M. in October, 1835, whereby, within five years from the passing of stat. 3 & 4 W. 4, c. 27, a fresh tenancy at will was created; which last tenancy was, within twenty-one years of its inception, namely, in 1840, determined by the lord's entry and resumption of possession. As to the piece of land taken possession of by plaintiffs in 1817: That the lord's right of entry to it could not be barred before 1837, before which, namely, in 1835, it was included in the land to which the fresh trustees were admitted; as it was, in 1840, in the land of which the lord retook possession. *Hodgson v. Hooper*, 149.

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- 4 Jac. 1, c. 3, s. 2. (Costs), 358. COSTS, I.
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- 17 G. 2, c. 38, s. 11. (Poor), 574. RATE, I. 2.
- 30 G. 2, c. 31, s. 5. (Thames Fishery). 588. THAMES CONSERVANCY ACT, 1857.
- 3 G. 4, c. 126. (General Turnpike), 238, 358. TURNPIKE.
- 4 G. 4, c. 34, s. 3. (Masters and Servants), 549. MASTER AND SERVANT, I.
- 6 G. 4, c. 57, s. 2. (Settlement of Poor), 437, 555. POOR, I. 1, i. ii.
- 6 G. 4, c. 129, s. 3. (Combination of Workmen), 516. MASTER AND SERVANT, II.
- 9 G. 4, c. 61, s. 21. (Innkeepers' Licensing), 1. GAMING.
- 10 G. 4, c. 56, s. 27. (Friendly Societies), 623. FRIENDLY SOCIETIES ACTS.
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SUNSTROKE.

Death by, not death by accident, within life policy against accidents, 478. INSURANCE.

[SURFACE.

MINES AND MINERALS.]

TENANT.

LANDLORD AND TENANT.

THAMES CONSERVANCY ACT, 1857.

(20 & 21 Vict. c. cxlvii.)

Sects. 52, 76. Power of Conservators of Thames to appoint assistant river keepers, with authority to enter fishing boats and seize brood of fish, under stat. 30 G. 2, c. 21, s. 5. Penalty incurred by obstructing such keepers.

Stat. 30 G. 2, c. 21, s. 5, enacts that, for the better preservation of the fishery of the river Thames, within the jurisdiction of the mayor of London, as conservator of the river, it shall be lawful "for the deputy of the said mayor for the time being, as conservator as aforesaid, commonly called the water bailiff, and his assistant or

assistants," appointed by warrant under the hand and seal of the mayor, to enter the boat of any fisherman or other person fishing on the Thames, and seize all brood of fish found there. Sect. 6 imposes a penalty of 10*l.* on any person "who shall obstruct or hinder the said water bailiff" or "his assistants," "in the execution of any of the powers vested in them by this Act;" and sect. 11 gives a convicted person a right of appeal to the next Court of Conservancy.

The Thames Conservancy Act, 1857, 20 & 21 Vict. c. cxlvii., creates a new corporation, called "The conservators of the river Thames," and, by sect. 53, transfers to them "all the powers, authorities, rights and privileges," which might be exercised by the mayor of London, "by prescription, usage, charter, or Act of Parliament, or otherwise, with regard or relation to the conservancy and the preservation and regulation of the river Thames," save only so far as the same may be modified by, or be inconsistent with, the provisions of that Act. Sect. 76 imposes a penalty, not exceeding 5*l.*, on any person who "shall resist or make forcible opposition against any person employed in the due execution of this Act."

Held that, under the latter Act, although it does not apparently have the fishery of the Thames in contemplation, the conservators of the Thames are empowered to appoint, under their hands and seals, assistant river-keepers, with express authority to enter fishing boats and seize brood of fish, in pursuance of stat. 30 G. 2, c. 21, s. 5; and that a person obstructing such an assistant river-keeper in so doing, is not liable to the penalty imposed by sect. 6 of that statute; but is liable to the penalty imposed by stat. 20 & 21 Vict. c. cxlvii. s. 76. *Turnidge v. Shaw*, 588.

TOLL.

I. Turnpike.

1. Exemption from, of fodder for cattle, 239. *TURNPIKE*, I.
2. Ejectment by mortgagee of. Costs on plaintiff's nonsuit, 358. *COSTS*, I.

II. Right of Company empowered by statute to take toll in return for a public service, to remit toll in whole or in part. Stats. 11 G. 4, c. lxx. s. 76; 6 & 7 W. 4, c. cxxxiii. ss. 53, 125. Right of Market Company to landing tolls for use of pier adjoining market.

A Company empowered by statute to take tolls in return for a public service is not bound, independently of express enactment, to exact the same tolls from all persons alike; but is at liberty to remit the tolls, or any portion of them, to particular persons, at its pleasure and discretion.

Stat. 11 G. 4, c. lxx., by which plain-

tiffs, a market Company, were incorporated, by sect. 76 empowered them to take from the master of any steamboat "in respect of every passenger landing on or embarking from the wharf or causeway" authorised by the Act to be made, "the" "tolls" "which" should "at any time or from time to time be fixed and appointed by" plaintiffs, not exceeding 3*d.* for each passenger. A subsequent Act, 6 & 7 W. 4, c. cxxxiii., incorporating another Company for the purpose of building a bridge from plaintiffs' market over the Thames, by sect. 53 authorized plaintiffs to levy the same tolls for passengers landing on or embarking from the northern pier of the intended bridge which stat. 11 G. 4, c. lxx. s. 76, had empowered them to levy. And by sect. 125 it was enacted, that "the tolls to be taken by virtue of" the "Act should at all times be charged equally," and that every "reduction or advance of" them should "extend to all persons whatever using the said bridge."

Plaintiffs, after the bridge had been built, fixed and appointed the toll to be received "under the 76th clause of" their "Act of incorporation, from the master of every steamboat" "in respect of every passenger landing on or embarking from" the northern pier, at 3*d.* But by agreement with defendants, a steamboat Company, they charged defendants a toll of 1*s.* 4*d.* per 100 of their passengers; and, by agreement with another steamboat Company, charged that Company a lower toll of 1*d.* per dozen of their passengers. Passengers landing on or embarking from the northern pier from or on to steamboats used no other portion of the bridge than the northern pier, which abutted on plaintiffs' land.

Plaintiffs having brought this action to recover from defendants arrears of toll for passengers at the rate agreed upon with defendants: held, that plaintiffs were entitled to recover the full amount. That stat. 11 G. 4, c. lxx. s. 76, was not an equality clause, requiring plaintiffs to charge the fixed and appointed toll in full for each passenger; but that it directed the toll to be fixed and appointed merely in order that the public might know the maximum toll they could be called upon to pay; leaving plaintiffs' right to lower or remit the toll, if it otherwise existed, wholly untouched. That in the absence of an equality clause in that Act such right did exist, and was not abrogated by stat. 6 & 7 W. 4, c. cxxxiii. s. 125, that enactment applying only to tolls taken by the bridge Company for the use of the bridge, and not to the tolls taken by plaintiffs. *Hungerford Market Company v. City Steamboat Company*, 365.

TRADE MARK.

Action for fraudulently causing plaintiff un-

knowingly to counterfeit a third person's trade mark; when sustainable. Damages. Costs of Chancery suit brought by the third person against, and compromised by, plaintiff, recoverable.

Declaration, for that, plaintiff having agreed with defendant to make for and sell to him bricks, to be marked as defendant might direct, defendant wrongfully, deceitfully, and injuriously directed plaintiff to mark them with the name of R.; defendant then well knowing, and plaintiff not knowing, as the fact was, that R. used that name as a mark on bricks made and sold by him, to distinguish them from bricks made and sold by other persons; and that plaintiff, by so marking the bricks to be made for defendant, would become liable to legal proceedings for damages at the suit of R., and to be restrained by injunction from making any more of such bricks. That plaintiff, in ignorance of the consequences, and of R.'s rights, marked the bricks as directed by defendant, and delivered them to him. That R. thereupon filed a bill in Chancery against plaintiff for an injunction, on account of the profits made by plaintiff from the bricks, and a decree that plaintiff should pay the amount thereof to R. That plaintiff thereupon compromised such suit by paying R. a large sum of money for his damages, costs, and expenses, and was also compelled to pay large sums of money for the costs of his own necessary defence to the suit.

Demurrer. Joinder in demurrer.

Held, that the declaration disclosed a good cause of action, on the ground that plaintiff, though innocent of fraud in counterfeiting R.'s mark, was nevertheless liable in equity to the suit for having in fact counterfeited it: and semble also on the ground that, the natural consequence of defendant's act being to plunge plaintiff into the Chancery suit, and thereby to cause him to incur costs and expenses, plaintiff, whether or not he was liable to the suit, had a good cause of action against defendant to recover the damages so sustained. *Dixon v. Fawcus*, 537.

TRANSHIPMENT.

Of goods, in port of distress, 282. SHIP AND SHIPPING, III.

[TROVER.

BANKRUPT AND INSOLVENT, III.]

TRUSTEES.

Effect of sale of property by, at inadequate price, 685. VENDOR AND PURCHASER.

TURNPIKE.

I. General Turnpike Act, 3 G. 4, c. 126, s.

32. Exemption of fodder for cattle from turnpike toll.

The General Turnpike Act, 3 G. 4, c. 126, enacts, by sect. 32, "that no toll shall be demanded or taken" "on any turnpike road, for" "any horse, beast or other cattle or carriage employed in carrying or conveying, having been employed only in carrying or conveying on the same day," "any hay, straw, fodder for cattle, and corn in the straw, which has grown or arisen on land or ground in the occupation of the owner of any such hay, straw, fodder or corn in the straw, potatoes or other agricultural produce, and which has not been bought, sold or disposed of, nor is going to be sold or disposed of."

A horse and cart passed through a toll-gate, carrying threshed barley, which had grown on land in the occupation of the owner, to a mill to be ground into meal for feeding the owner's pigs. They re-passed on the same day laden with barley-meal obtained from the mill, the produce of another parcel of barley grown by the same owner on the same land, and previously sent to be ground into meal for the same purpose. The horse and cart had not been employed in any other way on the same day. Held, that they were exempt from toll under the above enactment on each journey: for that both the barley and the barley-meal came within the description of "fodder for cattle." *Clements v. Smith*, 238.

II. Ejectment by mortgagee of turnpike tolls. Costs on plaintiff's nonsuit, 358. COSTS, I.

USAGE.

Of trade. Parol evidence to explain term of art in written contract, 306. EVIDENCE, I. 3.

VALUER.

Under Enclosure Acts. Proceedings by, before justices, to recover possession of encroachment, 7. ENCLOSURE ACTS.

VENDOR AND PURCHASER.

Right of purchaser of realty to rescind contract, and recover deposit, where vendor is devisee of survivor of several donees of a power of sale given to them "or the survivor of them, or the heirs, executors, or administrators of such survivor." Effect of omission of "assigns" in description of donees of power. Court of law, how far bound to decide on validity of vendor's title. Right to rescind on ground of former sale to vendor at inadequate price, by trustees.

S., being seized in fee of a messuage, and having other real and personal estate,

died, having devised all his real and the residue of his personal estate to W. S. and H. S., "their heirs, executors and administrators," upon trust that W. S. and H. S., or the survivor of them, or the heirs, executors, or administrators of such survivor, should sell. The testator further declared that W. S. and H. S., or the survivor of them, or the executors or administrators of such survivor, should hold the proceeds of the sale in trust to pay debts and invest all the residue of the trust moneys in government or real securities, and pay the dividends equally between the testator's wife and daughter during their lives, and wholly to the survivor after the decease of one of them; and, after the decease of that survivor, to divide the whole equally amongst all the then living children of the testator, or, failing them, according to the Statute of Distributions. The testator also appointed W. S. and H. S. his executors. They acted in the trust, and H. S., the survivor, devised all his real and personal trust estates to A. and B. (whom he also appointed his executors), to hold to them, their heirs, executors, administrators and assigns, upon the same trusts as the testator H. S. held them. After the death of H. S., A. and B. sold the message in question to C., who subsequently contracted with plaintiff to sell it to him in fee.

In an action by plaintiff to recover the deposit money paid under this contract, on the ground that C. had failed to make out a good title, held (*dubitante Blackburn, J.*), that plaintiff was entitled to recover; inasmuch as, by reason of the omission of "assigns" in the description of the donees of the power of sale in the devise by S. creating the trust, the title of the devisees of H. S. to convey to C. was too doubtful for a Court of equity to compel specific performance of the contract.

Quere, per Blackburn, J., whether this Court, as a Court of law, was not bound to decide absolutely whether the vendor's title was good or bad.

S. in 1810 bought the message in fee for 462*l.* The price paid to A. and B. by C., upon the sale of it to him in 1855, was only 73*l.* 4*s.*, and the contract price between C. and plaintiff, in 1859, was 350*l.*

Held, per totam Curiam, that the inadequacy of the price at which A. and B. sold constituted a breach of trust: and that, as plaintiff, having notice, was affected thereby, plaintiff was entitled on that ground to refuse to complete the contract. *Stevens v. Austen*, 685.

VENUE

Power of Court to change, in quo warranto. Ground for change.

The Court has power to change the

venue in an information in the nature of a quo warranto: and a suggestion on the record, that the trial of the issue can be more conveniently had in the county of the substituted venue, shows sufficient ground for the change, and for the subsequent proceedings in that county. *Clark v. Regina*, 147.

WATERMEN'S AND LIGHTERMEN'S ACTS.

7 & 8 G. 4, c. clxxv. ss. 37, 101: 22 & 23 Vict. c. cxxxiii. ss. 7, 54. Penalty when incurred by unqualified person navigating barge for hire on Thames. Western barges.

The Watermen's and Lightermen's Amendment Act, 1859, 22 & 23 Vict. c. cxxxiii., by sect. 54 subjects to a penalty "any person, not being a freeman licensed in pursuance of" the "Act, or an apprentice, qualified according to" the "Act, to a freeman or to the widow of a freeman of the" Watermen's Company, who "shall at any time act as a waterman or lighterman, or ply or work or navigate any" "lighter" "upon the" "river" Thames "from or to any place or places" "within the limits of" the "Act, for hire or gain."

Stat. 7 & 8 G. 4, c. clxxv., which by sect. 37 imposed a similar penalty, and by sect. 101 exempted therefrom persons navigating "western barges," is repealed by stat. 22 & 23 Vict. c. cxxxiii., which by sect. 7 enacts, "that such repeal shall not affect" "any appointment or license duly made or granted under any enactment hereby repealed."

Held, that a person found plying and navigating a barge for hire on the Thames, within the limits of stat. 22 & 23 Vict. c. cxxxiii., and not being licensed or qualified according to the Act, incurs a penalty under sect. 54, though the barge started from a place beyond those limits, and would, under stat. 7 & 8 G. 4, c. lxxv., have been deemed a "western barge." *Doick v. Phelps*, 244.

WATERWORKS COMPANY.

Rateability to poor-rate of apparatus of, 108. Rate, *l.* 1, *i.*

WEIGHTS AND MEASURES ACT.

(5 & 6 W. 4, c. 63.)

Sects. 21, 28. What are "measures" liable to seizure and forfeiture.

Earthenware jugs or drinking cups, ordinarily used as imperial measures by a publican in his business, are, although not stamped as measures, and exempted by stat. 5 & 6 W. 4, c. 63, s. 21, from being so stamped, nevertheless "measures" within the meaning of sect. 28 of that act,

which empowers any authorized inspector of weights and measures to enter any shop or place within his jurisdiction, in which goods are exposed and kept for sale, and there to examine all measures, and to compare and try them with the copies of the imperial standard measures required by the Act to be provided: and renders measures found on such examination to be unjust, liable to be seized and forfeited; and the person in whose possession they are found to be convicted in a penalty. *Regina v. Aulton*, 568.

WESLEYAN MINISTER.

Settlement of, 555. Poor, I. 1. ii.

WORDS.

I. "Any other person whomsoever" in a statute, following words of description of particular persons. Construction, 501. STATUTE.

II. "Assigns." Effect of omission of, in description of donees of power of sale, 685. VENDOR AND PURCHASER.

THE END.

EXHIBIT

2, 112

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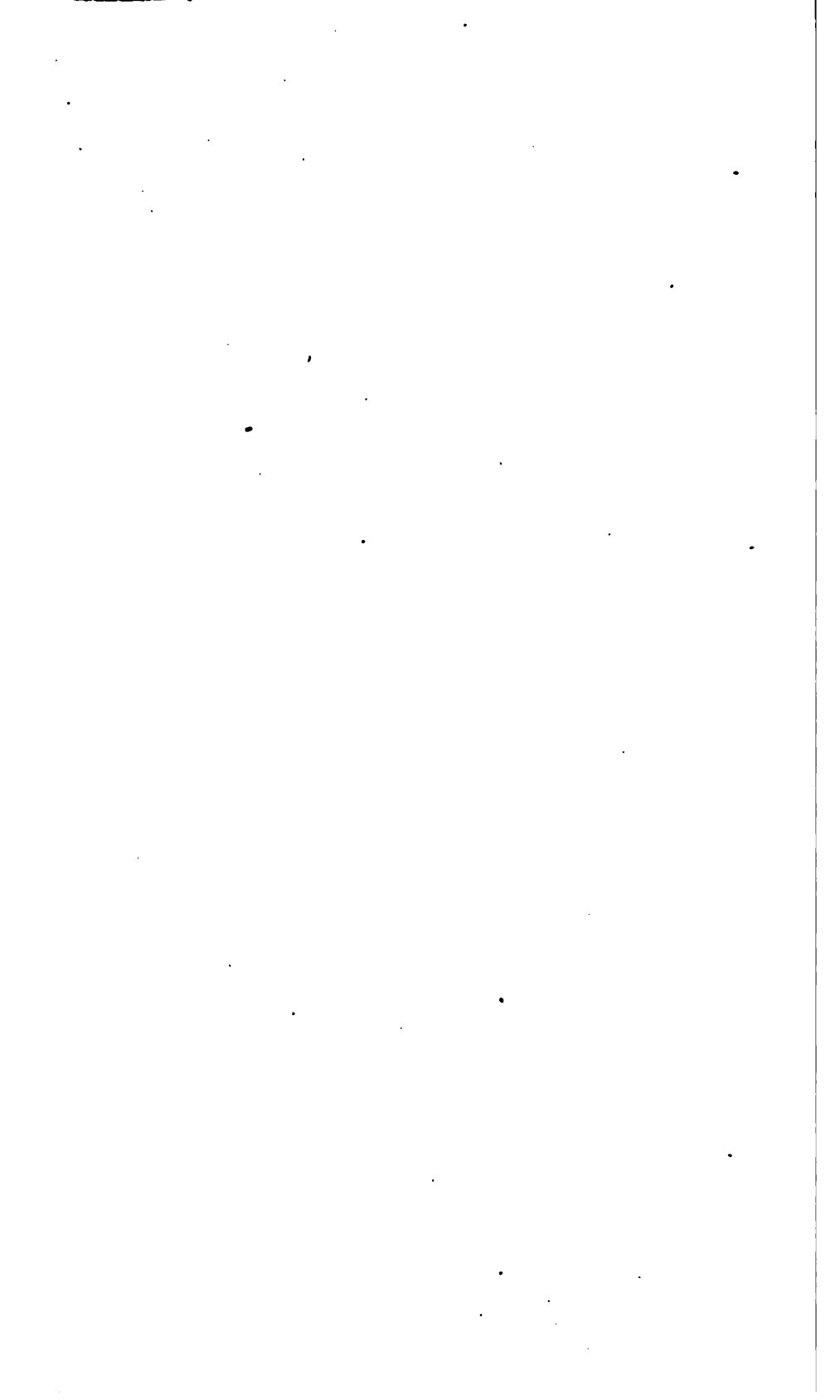
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